



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 707/2022

In the matter between:

THE NATIONAL CREDIT REGULATOR

APPELLANT

and

NATIONAL CONSUMER TRIBUNAL

FIRST RESPONDENT

ELAVATION TRADING CC t/a

XCELSIOR FINANCIAL SERVICES

SECOND RESPONDENT

XCELSIOR FINANCIAL

SERVICES (PTY) LTD

THIRD RESPONDENT

Neutral citation: *The National Credit Regulator v National Consumer Tribunal and Others* (707/2022) [2023] ZASCA 133 (17 October 2023)

Coram: PONNAN, MBATHA, HUGHES and WEINER JJA and
NHLANGULELA AJA

Heard: 5 September 2023

Delivered: 17 October 2023

Summary: Review of National Consumer Tribunal's (Tribunal) decision granting condonation for late filing of supplementary founding affidavit – whether Tribunal had such power.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Lukhaimane J sitting as court of first instance):

The appeal is dismissed.

JUDGMENT

Weiner JA (Mbatha JA concurring)

Introduction

[1] This appeal is concerned with whether the first respondent, the National Consumer Tribunal (the Tribunal) has the power to condone the filing of a supplementary founding affidavit (the supplementary affidavit) by the appellant, the National Credit Regulator (the NCR) in proceedings before it. These proceedings concerned an application by the NCR to cancel the registration of the second and third respondents, Elevation Trading CC and Xcelsior Financial Services (Pty) Ltd as credit providers.

[2] The NCR was established in terms of s 12 of the National Credit Act 34 of 2005 (the Act). The NCR is responsible for promoting and supporting the development of a fair, transparent, competitive, efficient and easily accessible credit market to serve the needs of historically disadvantaged, and low income persons and communities, in a manner consistent with the Act.¹

¹ The preamble to the Act sets out the objectives: ‘To promote a fair and non-discriminatory market place for access to consumer credit and for that purpose to provide for the general regulation of consumer credit and improved

[3] The National Consumer Tribunal (the Tribunal) was established in terms of s 26 of the Act. It is an independent adjudicative body, deriving its mandate from the Act. Its mandate is to hear and decide on cases involving, inter alia, consumers and credit providers. A decision of the Tribunal has the same status as one made by the high court.

[4] The second and third respondents are registered credit providers under the Act. Elevation Trading CC is a close corporation registered under the Close Corporation Act 69 of 1984 and Xcelsior Financial Services (Pty) Ltd is a company registered under the Companies Act 71 of 2008. These respondents shall be referred to collectively as the respondents.

[5] The Tribunal found that it had the power, in terms of the Act and the Rules for the Conduct of Matters before the National Consumer Tribunal (the rules), to condone the filing of the supplementary founding affidavit (the supplementary affidavit) on good cause shown. It granted condonation and permitted the respondents to file an answering affidavit in response to the supplementary affidavit within 15 days, and made no order as to costs (the decision). The respondents brought a review to set aside the Tribunal's decision, which succeeded in the Gauteng Division of the High Court, Pretoria (the high court). This appeal is with the leave of the high court.

standards of consumer information; to promote black economic empowerment and ownership within the consumer credit industry; to prohibit certain unfair credit and credit-marketing practices; to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting; to provide for debt reorganisation in cases of over indebtedness; to regulate credit information; to provide for registration of credit bureaux, credit providers and debt counselling services; to establish national norms and standards relating to consumer credit; to promote a consistent enforcement framework relating to consumer credit; to establish the National Credit Regulator and the National Consumer Tribunal; to repeal the Usury Act, 1968, and the Credit Agreements Act, 1980; and to provide for related incidental matters.'

Background

[6] Having received complaints from clients of the respondents, that they were engaged in various contraventions of the Act, the NCR instituted an investigation against the respondents. The complaints related to the respondents charging excessive loan initiation charges, failing to conduct affordability assessments, extending credit recklessly, charging storing fees and insurance illegally, and using the consumers' motor vehicles as security for loans granted to its clients.²

[7] Upon conclusion of the investigation, a report was produced headed: 'Investigations into the Activities of Xcelsior Financial Services (Pty) Ltd' (the report). The NCR referred the matter to the Tribunal and filed an application in terms of s 57(1) of the Act,³ seeking the cancellation of the respondents' registration as a credit provider. The respondents opposed the referral application and filed an answering affidavit. Thereafter, the NCR filed a replying affidavit. The matter was postponed and re-enrolled for hearing on 15 July 2019.

[8] Shortly prior to the hearing, on 11 July 2019, the NCR delivered the supplementary affidavit together with an application for condonation. It applied to the Tribunal for an order to condone a departure from the rules and procedures as follows:

'1. Authorising the Applicant to file a supplementary founding affidavit, (which supplementary founding affidavit is attached hereto);

² The details of the contraventions are not pertinent to the issues in the appeal

³ Section 57(1) of the National Credit Act 34 of 2005 (the Act) states as follows:

'(1) Subject to subsection (2), a registration in terms of this Act may be cancelled by the Tribunal on request by the National Credit Regulator, if the registrant repeatedly-

(a) fails to comply with any condition of its registration;

(b) fails to meet a commitment contemplated in section 48(1); or

(c) contravenes this Act.'

2. Giving further directions with regard to the delivery of answering and replying affidavits pertaining to the supplementary founding affidavit;
3. Granting the Applicant leave to amend its Notice of motion Dated 4 July 2018, by the insertion in the Table in Part D thereof of the following additional rows.’

27.	<i>CONTINUOUS</i>	<i>Contravention of Section 106(5)(c)</i>
28.	<i>CONTINUOUS</i>	<i>Contravention of Section 106 (1)(b)(ii)</i>
29.	<i>CONTINUOUS</i>	<i>Contravention of Section 99(1)(b) (Alternative claim in the event that it is found that the respondents’ credit agreements constitute pawn transactions</i>

[9] In seeking this relief, the NCR explained that, in preparing for the hearing of the matter on 15 July 2019, it realised that there were some minor issues with the founding affidavit which needed to be addressed. Although it had made the necessary factual allegations in the founding affidavit regarding infringements of s 106(5)(c)⁴ and 106(1)(b)(ii),⁵ alternatively s 99(1)(b)⁶ of the Act, it had omitted to ask the Tribunal to declare that they were contraventions of the Act. The NCR sought to remedy this in the supplementary affidavit. The NCR also wished to supplement the founding affidavit by providing a more detailed explanation of the

⁴ Section 106(5)(c) of the Act states that:

‘(5) With respect to any policy of insurance arranged by a credit provider as contemplated in (4), the credit provider must –

...

(c) explain the terms and conditions of the insurance policy to the consumer and provide the consumer with a copy of that policy...’

⁵ Section 106(1)(b)(ii) provides as follows:

‘(1) A credit provider may require a consumer to maintain during the term of their credit agreement –

...

(b) either –

(i)...)

(ii) in any other case, insurance cover against damage or loss of any property other than property referred to in subparagraph (i), not exceeding, at any time during the life of the credit agreement, the total of the consumer's outstanding obligations to the credit provider in terms of their agreement.

⁶ Section 99. ((1)(b) states:

‘(1) A credit provider who enters into a pawn transaction with a consumer-

...

(b) must retain until the end of the credit agreement, and at the risk of the credit provider, any property of the consumer that is delivered to the credit provider as security under the credit agreement- . . .’

conclusion it had reached in the founding affidavit, that the agreements that the respondents had concluded with its customers were not ‘pawn transactions’⁷ but ‘secured loan agreements’.⁸ Such explanation was provided *ex abundante cautela*, as the NCR believed that it was a matter for legal argument.

The power of the Tribunal to grant condonation for the filing of the supplementary affidavit?

[10] The NCR argued that it did. The respondents opposed the application on the basis that, as a creature of statute, the Tribunal did not have the power to allow the filing of the supplementary affidavit.

[11] The procedures in the rules provide for the NCR to refer the matter to the Tribunal and file an application in terms of rules 6⁹ and 7¹⁰, with the requisite

⁷ Definition as set out in section 1 of the Act –

“‘pawn transaction” means an agreement, irrespective of its form, in terms of which –

(a) one party advances money or grants credit to another, and at the time of doing so, takes possession of goods as security for the money advanced or credit granted; and

(b) either-

(i) the estimated resale value of the goods exceeds the value of the money provided or the credit granted, or

(ii) a charge, fee or interest is imposed in respect of the agreement, or in respect of the amount loaned or the credit granted; and

(c) the party that advanced the money or granted the credit is entitled on expiry of a defined period to sell the goods and retain all the proceeds of the sale in settlement of the consumer’s obligations under the agreement; . . .’.

⁸ Definition as set out in section 1 of the Act –

“‘secured loan” means an agreement, irrespective of its form but not including an instalment agreement, in terms of which a person –

(a) advances money or grants credit to another, and

(b) retains, or receives a pledge or cession of the title to any movable property or other thing of value as security for all amounts due under that agreement;...’.

⁹ Rule 6, which governs notification of parties and service of application documents, provides as follows:

‘(a) The Applicant must notify the persons mentioned in column g of Table 2 by serving on them the documents required under column h of that Table.

(b) The application documents filed with the Tribunal must include a proof of service for every person requiring notification.’

¹⁰ Rule 7, which deals with filing an application, states that:

‘(1) Once notification of an application has been served in terms of rule 6, the application must be filed with the Registrar.

(2) An application is filed by delivery of the relevant Form and all the documents listed in column e of Table 2, if applicable, or as required elsewhere in these rules, to the Registrar. (5) The filing of an application must comply

documents, including the founding affidavit. Rule 13¹¹ provides for an answering affidavit to be filed, and, a replying affidavit can be filed in terms of rule 14.¹²

[12] Other procedures open to a party in the Tribunal include rule 15 which provides for the amendment of documents. It reads:

‘(1) An Applicant or Respondent may at any time prior to the conclusion of the hearing of the matter, apply by way of Form TL.r15 for an order authorising an amendment of documents filed in connection with the proceedings save that where all parties to the proceedings consent in writing to a proposed amendment, such amendment may be effected by merely delivering the amended documents to the Tribunal and to the parties.

(2) A party affected by an amendment may respond within a time allowed by the Tribunal.’

[13] In regard to the powers of condonation, s 150(e) of the Act provides:

‘150. Orders of Tribunal

In addition to its other powers in terms of this Act, the Tribunal may make an appropriate order in relation to prohibited conduct or required conduct in terms of this Act, or the Consumer Protection Act, 2008, including –

...

(e) condoning any non-compliance of its rules and procedures on good cause shown. . .’

[14] Rule 3 re-iterates, in part, s 150. It reads:

‘3. Powers of the Tribunal

...

with the general rules for delivery of documents in terms of these rules.’

¹¹ Rule 13 (1), headed ‘Opposing an application or referral’, provides that:

‘(1) Any Respondent to an application or referral to the Tribunal may oppose the application or referral by serving an answering affidavit Any Respondent to anon-

(a) the Applicant; and

(b) every other person on whom the application or referral to the Tribunal was served.’

¹² Rule 14, dealing with the reply by the applicant provides that:

‘(1) The Applicant may within 10 business days of being served with an answering affidavit, lodge a replying affidavit to any new issues raised in the answering affidavit, other than a point of law.’

(2) The Tribunal may-

...

(c) consider applications related to an adjudication process-

...

(iv) to condone non-compliance with the rules and proceedings of the Tribunal;

...

(vii) relating to other procedural matters.’

[15] Rule 3 deals with the powers of the Tribunal and gives effect to the provisions of s 145 of the Act, which provides for the Rules of procedure. It reads: ‘Subject to the rules of procedure of the Tribunal, the member of the Tribunal presiding at a hearing may determine any matter of procedure for that hearing, with due regard to the circumstances of the case and the requirements of the applicable sections of this Act.’

[16] Rule 34, in material parts, provides as follows:

‘34 (1) A party may apply to the tribunal in form TI r.34 for an order to:

...

(d) condone any other departure from the rules or procedures.

(2) The Tribunal may grant the order on good cause shown.’

[17] The Tribunal regarded the filing of the supplementary affidavit as a departure from the its rules and procedures. It decided that it had therefore the power to grant the application in terms rule 34(1)(d), read with rule 3(2)(c)(iv) and (vii). It granted condonation, finding, in addition, that good cause had been shown.

[18] The respondents launched review proceedings in the high court to set aside the Tribunal’s decision, submitting that the Tribunal did not have the power to

grant the order that it did and, in any event, good cause was not shown for condonation to be granted.

[19] The high court held that the filing of the supplementary affidavit was, in terms of rule 34(1)(d), a departure from the rules and procedures of the Tribunal and that ‘the only circumstance under which such action can be condoned is upon good cause shown.’ But it found that because of the lack of a detailed explanation relating to the delay, good cause had not been shown. It set aside the decision of the Tribunal and remitted it back to the Tribunal to decide whether or not to grant condonation to the NCR for the filing of the supplementary affidavit. Quite what that process would entail, is difficult to comprehend.

[20] In this Court, there was no appearance on the respondents’ behalf at the hearing. It had, however, filed heads of argument in which it again submitted that the Tribunal, as a creature of statute, cannot determine its own procedures. It contended that the filing of a supplementary affidavit is not provided for under rule 34, and was not merely ‘a departure from the rules or procedures’, but a process involving the inclusion of additional evidence. It is therefore not covered by rule 3, but rather by rule 10, which provides that for matters not listed in rule 3, or otherwise provided for in the rules, an application to the high court for a declaratory order was required.¹³

Analysis

¹³ Rule 10 provides as follows:

‘Applications in respect of matters not provided for in the rules

(1) A person wishing to bring before the Tribunal a matter which is not listed in rule 3, or otherwise provided for in these rules, must first apply to the High Court for a declaratory order confirming the Tribunal’s jurisdiction—

(a) to deal with the matter;

(b) to grant the order to be sought from the Tribunal.’

[21] In *Lewis Stores (Pty) Ltd v Summit Financial Partners (Pty) Ltd and Others (Lewis)*,¹⁴ this Court held that the Act provides for an ‘expeditious, informal and cost-effective complaints procedure’. Part D of chapter 7 of the Act relates to the consideration by the Tribunal of ‘complaints, applications and referrals’. Section 142 of the Act sets out the powers and obligations of the Tribunal in conducting a hearing. It states that the Tribunal is required to conduct hearings in public, in an inquisitorial manner, as expeditiously and informally as possible, and in accordance with the rules of natural justice.¹⁵

[22] The approach adopted by the Competition Tribunal in *The Competition Commission v South African Airways* was as follows:¹⁶

‘The Tribunal is a creature of a particular statute that has as its principal objective the protection of the public from anti-competitive conduct. This reality accounts for certain of the powers given us by the legislature including our inquisitorial power and it animates our approach to a range of simple and complex matters including the status of pleadings before us. *In short it ensures that we adopt, if anything, a more flexible approach to the pleadings before us than would the High Court in a civil matter.* We are not refereeing a conflict between two private rivals; we are securing the objectives of the Competition Act. We are not refereeing a conflict between two private rivals; we are securing the objectives of the Competition Act.’¹⁷(Emphasis added.)

[23] In my view, the informality of the process in the Tribunal similarly calls for a more flexible approach in relation to the pleadings filed. As with the Competition Tribunal, the Tribunal has an inquisitorial role to ensure that all relevant and material facts are considered and ventilated. It is the role of the NCR and the

¹⁴ *Lewis Stores (Pty) Ltd v Summit Financial Partners (Pty) Ltd and Others* [2021] ZASCA 91; 2022 (1) SA 377 (SCA) (*Lewis*) para 15; see also s 139(c) and 142(b) of the Act.

¹⁵ Section 142(a)-(d) of the Act.

¹⁶ *The Competition Commission v South African Airways (Pty) Ltd* [2001] ZACT 44 (SAA).

¹⁷ SAA at 5-6.

Tribunal to protect the public from unscrupulous conduct. The approach adopted in the second judgment, seeks to place a restriction on the powers of the Tribunal and adopts a strict approach, as one might do in civil proceedings. This approach flies in the face of the express provisions of the Act which require proceedings to be conducted informally.

[24] The second judgment, in finding that the Tribunal did not have the power to condone the filing of the supplementary affidavit, describes the allegations in the supplementary affidavit as ‘new information’ which was not included in the founding affidavit. It refers to the following excerpts in the supplementary affidavit, which it states ‘makes plain, the NCR sought in some respects to advance a ‘new case’ in the supplementary founding affidavit:

‘4. I am deposing to this affidavit to include following, which was not included in the Applicant’s original founding affidavit:

4.1. That the Respondents repeatedly contravened Section 106(5)(c) and 106(1)(b)(ii) of the Act;

4.2. That the Respondents have repeatedly contravened section 99(1)(b), as an alternate contravention in the event that the Tribunal finds that the Respondents’ credit agreements are pawn transactions;

4.3. To include a more detailed explanation as to why the Applicant submits that the Respondents’ agreements are secured credit agreements, not pawn transactions.’

[25] However, as the deponent to the supplementary affidavit explains, the facts relating to each of the contraventions mentioned were contained in the founding affidavit and the report, but the conclusions and declarators that they amounted to contraventions of the Act, were erroneously omitted. Thus, in the notice of motion, to which the founding affidavit in the condonation application is attached, the NCR

seeks relief that these practices be declared as contraventions of the Act. All three of the sections referred to deal with the insurance for which the respondents required consumers to pay.

[26] In regard to the contravention of s106(5)(c) of the Act, the NCR had alleged in the founding affidavit that ‘it is a general business practice of the respondents to advise consumers that insurance is required in terms of the loan’, and ‘they are not given the opportunity or right to waive the proposed policy and substitute it for a policy of the consumer’s own choice. Further, the respondents do not provide consumers with a copy of the policy document’. These are clearly contraventions of s 106(5)(c) of the Act.

[27] From the investigations referred to in the founding affidavit, in terms of s 106(1)(b)(iii) of the Act, the maximum of any loan to a consumer is fixed at the maximum of 50% of the market value of the consumers’ vehicles. All the credit agreements sampled during the NCR’s investigation make provision for consumers to pay insurance premiums for insurance which covers the full value of the vehicle. This amounts to a contravention of s 106(1)(b)(iii) of the Act. This section was expressly mentioned in the report, and is a precursor to s 106(2),¹⁸ which was cited as another section of the Act that was contravened.

[28] The respondents contended that the agreements were not secured loan agreements, but pawn transactions. If this is so, the alternative contravention of s

¹⁸ Section 106 (2) of the Act provides that:

‘Despite subsection (1), a credit provider must not offer or demand that the consumer purchase or maintain insurance that is-

(a) unreasonable; or

(b) at an unreasonable cost to the consumer, having regard to the actual risk and liabilities involved in the credit agreement.’

99(1)(b) of the Act becomes applicable. Under that section, a credit provider under a pawn transaction is prohibited from requiring a consumer to take up or pay for insurance which covers the risk of loss or damage to the consumer's vehicles during the period that the vehicles are held in pledge by the respondents as security for the consumers' indebtedness to the respondents. As set out above, it is common cause that the respondents required their clients to pay for insurance. The NCR thus sought to include an order that, in the event that it is held that the respondents have concluded pawn transactions as opposed to secured loan agreements, that they had contravened s 99(1)(b) of the Act.

[29] The final issue which was sought to be introduced in the supplementary affidavit was an explanation as to why the NCR regarded the respondents' agreements as secured loan agreements, rather than pawn transactions (as defined in the Act). This issue was dealt with in detail in the report. In NCR's founding affidavit in support of the application for condonation, the NCR alleged that:

‘ . . . [t]he issue regarding categorisation of the credit agreements according to the definitions under the National Credit Act is, I submit, central to the dispute between the parties. The Respondents complain that the Applicant's founding papers do not explain the basis upon which the Applicant claims that the agreements are secured loans as opposed to pawn transactions. The Applicant submits that this was an issue of interpretation of the Act and thus would be addressed in legal argument at the hearing. and, therefore, it was not strictly necessary to set out this argument in its founding affidavit.’

[30] The NCR however, *ex abundante cautela*, in their supplementary affidavit, referred to three reasons for the distinction. They contended that:

- (a) The respondents were not entitled to retain all of the proceeds of the sale of the vehicle. If there was a surplus, as required in terms of paragraph (c) of the definition of ‘pawn transaction’;
- (b) Conversely, if there was a shortfall, the credit agreements do not provide that the proceeds from the sale of the vehicle will constitute full and final settlement of the consumer’s debt. And the respondents do not accept the proceeds of the sale as full and final settlement of the debt (also required in terms of paragraph (c) of the definition);
- (c) The agreements, on the other hand, meet all of the definitional requirements required to be considered ‘secured loan’ agreements.

This explanation was based upon the facts set out in the report and the founding affidavit and are referred to in s 99 (1)(b).

[31] It is thus clear that no new case is made out in the supplementary affidavit. It made references to the report, which was attached to the founding affidavit. All the facts relating to the contraventions were contained therein. The interpretation of the definitions and descriptions in the Act, of pawn transactions and secured loan agreements, is a matter for legal argument. No new evidence was produced in the supplementary affidavit, and none will be required at the hearing.

[32] If one has regard to the nature of the allegations contained in the supplementary affidavit, they seek, in effect, to amend the notice of motion and founding affidavit, by adding the necessary declarators of the contraventions. The rules provide for three affidavits to be filed, thus this application amounted to a departure from those rules and procedures. The description of the alternative contravention was already set out in the founding affidavit. The NCR could,

equally, have sought an amendment to its notice of motion and founding papers to effect these insertions, in terms of rule 15. Whether an amendment to an affidavit would be permissible is not for this Court to decide, but NCR sought instead, to file a supplementary affidavit, a departure from the procedure set out in rules 6,7,13,14 and 15. In my view, the application clearly falls within the category of ‘any departure from the rules and procedures’. Rule 10 has no application because the condonation sought is listed in rule 3 and contrary to the submissions of the respondents, no further evidence will be required at the hearing.

[33] If the appeal is refused on the basis that the Tribunal did not have the power to make the decision which it did, the NCR would be compelled to either bring an application for an amendment or one in terms of rule 10. This protracted procedure would have the same result as the condonation now sought, but it would be contrary to the express provisions of the rules for the proceedings to be conducted expeditiously and informally.

[34] I am of the view that the Tribunal correctly exercised the general powers of condonation contained in rules 3, 34 and s 150 of the Act, in holding that the filing of the supplementary affidavit was a departure from its rules and procedures, which it could condone.

Good Cause

[35] It is trite that ‘good cause’ is a requirement for condonation and is expressly referred to in rule 34(2). This requires the exercise of a discretion, on an objective conspectus of all the facts.¹⁹ The Constitutional Court, in *Competition Commission*

¹⁹ *Head of Department of Education Limpopo Province v Settlers Agricultural High School and Others* [2003] ZACC 15; 2003 (11) BCLR 1212 (CC) para 11; *Van Wyk v Unitas Hospital and Others* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) para 20.

of *South Africa v Pickfords Removals SA (Pty) Limited (Pickfords)*,²⁰ repeated the principles laid down in much jurisprudence on this point. It stated that:

‘Courts are afforded a wide discretion in evaluating what constitutes “good cause”, so as to ensure that justice is done. Ultimately, the overriding consideration is the interests of justice’, which are ‘inter-related: they are not individually decisive’.²¹

The importance of the issue and the strong prospects of success may compensate for a long delay.²² The Tribunal took into account that the supplementary affidavit did not introduce new causes of action and no further evidence was required. Although the explanation for the delay provided by the NCR was lacking in detail, the prospects of success were good, and the matter was of importance as the contraventions impacted on consumers’ rights. The respondents were given an opportunity to file an answer to the supplementary affidavit, thus eliminating any prejudice which they may have suffered. It was therefore in the interests of justice that the NCR be granted condonation and be permitted to supplement its founding affidavit.

Discretion

[36] In setting aside the decision of the Tribunal to grant condonation, the high court failed to appreciate that its power to substitute its own determination for that of the high court, is constrained. This much was stated as follows by Ponnann JA in *Lieutenant Colonel KB O’Brien NO v The Minister of Defence and Military Veterans and Others (O’Brien)*:²³

²⁰ *Competition Commission of South Africa v Pickfords Removals SA (Pty) Limited* [2020] ZACC 14; 2020 (10) BCLR 1204 (CC); 2021 (3) SA 1 (CC); [2020] 1 CPLR 1 (CC).

²¹ *PAF v SCF* [2022] ZASCA 101; 2022 (6) SA 162 (SCA) at para 15, citing *Melane v Santam Insurance Company Ltd* 1962 (4) SA 531 (A) at 532C-F.

²² *Ibid.*

²³ *Lieutenant Colonel KB O’Brien NO v The Minister of Defence and Military Veterans and Others* [2022] ZASCA 178; [2023] 1 All SA 341 (SCA) (*O’Brien*).

‘Importantly, we are not simply at large to interfere with the discretion exercised by the high court. In that regard, the distinction as to whether the discretion exercised by the high court in granting condonation was one in the ‘true’ or ‘loose’ sense is important. The importance of the distinction, as the Constitutional Court explained in *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another*, is that it dictates the standard of interference by this court. However, as the Constitutional Court emphasised, ‘even where a discretion in the loose sense is conferred on a lower court, an appellate court’s power to interfere may be curtailed by broader policy considerations. Therefore, whenever an appellate court interferes with a discretion in the loose sense, it must be guarded.’²⁴

Ponnan JA, in *O’Brien*,²⁵ referred to *Florence v Government of the Republic of South Africa (Florence)*,²⁶ where Moseneke DCJ stated:

‘Where a court is granted wide decision-making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court has preferred is at odds with the law. *If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range.* This principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision-making.’ (Emphasis added.)

[37] It is clear that the discretion in this matter, is that referred to by Ponnan JA in the preceding paragraph in *O’Brien*. The high court was accordingly, not at large to interfere with discretion, which was not ‘at odds with the law’.

[38] There are two further reasons why the high court erred. The decision of the Tribunal was clearly interlocutory. It had no final effect,²⁷ and was therefore not reviewable. Secondly, if the Tribunal had the power to grant condonation, which I

²⁴ Ibid para 29.

²⁵ Ibid para 30.

²⁶ *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC) para 113.

²⁷ *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* (CCT 59/09) [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (9 March 2010).

find it did, the respondents' decision to review the Tribunal's decision should not have succeeded for the reasons stated by this Court in *Lewis*:

'The NCA provides for an expeditious, informal and cost-effective complaints procedure. The provisions of the NCA, as I have emphasized, requires a quick informal resolution of complaints. The notion of an appeal to the high court against a ruling by the Tribunal to allow a direct referral of a complaint to it is contrary to the purpose of the NCA. The conclusion to which I have come in respect of the construction of the NCA accords with the approach of the courts to appeals generally, which militates against appeals which do not contribute to the expeditious and cost effective final determination of the main dispute between the parties.'²⁸

[39] In the result I would have made the following order:

- 1 The appeal is upheld with costs.
- 2 The order of the high court is set aside and is substituted with the following:

'The application is dismissed with costs.'

SE WEINER
JUDGE OF APPEAL

Ponnan JA (Hughes JA and Nhlangulela AJA concurring)

[40] I have read the judgment of Weiner JA. For the reasons that follow, I find myself unable to agree with either the reasoning or conclusion reached by my learned Colleague.

²⁸ *Lewis* para 19.

[41] The second respondent, Elevation Trading CC t/a Xcelsior Financial Services (Elevation) and the third respondent, Xcelsior Financial Services (Pty) Ltd (Xcelsior) (collectively referred to as the respondents), are registered credit providers under the National Credit Act 34 of 2005 (the Act). The appellant, the the NCR, received complaints against the respondents. It is not necessary to detail the nature of the complaints; it suffices for the present to state that on the strength of them, the NCR initiated an investigation into the conduct of the respondents on 16 March 2017, leading it (the NCR) to the conclusion that the conduct of the respondents repeatedly contravened various provisions of the Act and the Regulations framed thereunder (the regulations).²⁹

[42] On 4 July 2018, the NCR applied to the first respondent, the Tribunal for the cancellation of the registration of the respondents as credit providers with immediate effect; the imposition of an administrative fine on the respondents; and, an order that the respondents refund their consumers. The application was opposed by the respondents. On 18 September 2018, the respondents filed their answering affidavit together with an application for condonation, which was granted by the Tribunal on 22 October 2018. The NCR thereafter filed its replying affidavit on 5 November 2019.

[43] On 10 July 2019, the NCR applied to the Tribunal for:

‘ . . . an order to condone a departure from the rules or procedures as follows:-

1. Authorising the Applicant to file a supplementary founding affidavit, (which supplementary founding affidavit is attached hereto);
2. Giving further directions with regard to the delivery of answering and replying affidavits pertaining to the supplementary founding affidavit;

²⁹ The National Credit Regulations 2006.

3. Granting the Applicant leave to amend its Notice of motion Dated 4 July 2018, by the insertion in the Table in Part D thereof of the following additional rows...'

[44] In support of the application, it was stated that 'whilst preparing for the hearing of the matter [it] had come to realise that there were some issues with the current pleadings . . . which need to be addressed'. It was further asserted on behalf of the NCR:

'11. I respectfully submit that it is in the interests of justice that condonation be granted and that Applicant be allowed to supplement its founding affidavit papers, for the following reasons:-

- 11.1 By allowing the Applicant to supplement its founding papers, all of the contraventions which arise from the facts at hand will be able to be fully ventilated and adjudicated;
 - 11.2 It would not be fair or in the interests of justice that the Respondents be enabled to escape liability for contravening the Act, based purely on minor deficiencies in the founding papers. Such a result would be extremely prejudicial to consumers who were the victims of the Respondent's unlawful conduct;
 - 11.3 The issue regarding categorisation of the credit agreements according to the definitions under the National Credit Act is, I submit, central to the dispute between the parties. The Respondents complain that the Applicant's founding papers do not explain the basis upon which the Applicant claims that the agreements are secured loans as opposed to pawn transactions. The Applicant submits that this is an issue of interpretation of the Act and thus is to be addressed by legal argument and, therefore, it was not strictly necessary to set out this argument in its founding affidavit. However, it is beneficial for the administration of justice that the Applicant be allowed to supplement its founding papers to deal with this issue which is central to the dispute between the parties – this will allow the primary dispute to be fully ventilated.
12. I respectfully submit that the prejudice suffered by the filing of the supplementary founding affidavit will be minimal, if any. In fact, the Applicant and the consumer protection

functions which it carries out will be prejudiced if the Applicant is precluded from filing the supplementary papers.’

[45] In opposing the application, Mr Robert Ribeiro, a member of Elevation and a director of Xcelsior, asserted that:

‘The applicant seeks an order that is simply not provided for in the regulations (rules) governing the procedures before the tribunal. The regulations do not provide for the filing of supplementary founding affidavits (or any other supplementary affidavits).’

[46] The application succeeded before the Tribunal, which evidently took the view that the application fell to be considered in terms of rule 34(1)(d). It stated:

‘The Tribunal . . . has previously ruled that a supplementary affidavit can be considered as an application in terms of Rule 34(1)(d); to condone a departure from the Rules and procedures [*Foschini Retail Group (Pty) Ltd v National Credit Regulator* NCT/84881/2017/140(1) NCA – Rule 34].’

[47] On 22 January 2020, the respondents applied to the high court for an order in the following terms:

‘The order of the first respondent dated 12 September 2019, annexed to the Notice of Motion as annexure “X”, is reviewed and set aside and the decision whether or not to grant condonation to the second respondent for the filing of a supplementary founding affidavit is remitted to the first respondent to consider and decide afresh.’

[48] Although not very elegantly expressed, the thrust of the respondents’ contention before the high court - as I conceive it - was that: first, as a creature of statute, the powers of the Tribunal are those specifically assigned to it in terms of the Act and the regulations; and, second (and this is linked to the first), that the rules governing proceedings before the Tribunal do not make provision for the

filing of a supplementary founding affidavit. Accordingly, so the contention proceeded, the Tribunal's order permitting the NCR to file a supplementary founding affidavit constituted a nullity and was thus susceptible to review.³⁰

[49] In my view, both the NCR and the Tribunal misconceived the enquiry. The NCR was not, in truth, seeking condonation for its failure to comply with one of the Rules for the Conduct of Matters before the Tribunal (the rules). It was not asking the Tribunal to alter a time limit prescribed by the rules or to condone its failure to comply with a rule. It was, properly construed, seeking the leave of the Tribunal to file a further affidavit. The application by the NCR was made on form TI.r34, in terms of which an applicant may apply to 'condone non-compliance with a rule or procedure in terms of Tribunal rule 34'.

[50] Rule 34, headed 'Condonation of late filing and non-compliance with rules', provides:

'(1) A party may apply to the Tribunal in Form TI.r34 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.

(2) The Tribunal may grant the order on good cause shown.'

[51] In this matter, reliance is sought to be placed on rule 34(1)(d). However, I cannot see how that rule can possibly apply to an application such as the present. Under the guise of a condonation application, the NCR was seeking the permission

³⁰ *Master of the High Court Northern Gauteng High Court, Pretoria v Motala NO and Others* [2011] ZASCA 238; 2012 (3) SA 325 (SCA); *Knoop and Another NNO v Gupta (No 1)* [2020] ZASCA 149; [2021] 1 All SA 17; 2021 (3) SA 135 (SCA) para 33 and 34.

of the Tribunal to do something that may well have fallen outside the scope and ambit of the rules; namely, the admission of a further affidavit. It seems to me doubtful that the Tribunal was empowered to permit the filing of a supplementary founding affidavit. Notably, in the Magistrates Court, which is also a creature of statute, rule 55(1)(i) expressly provides that ‘the court may in its discretion permit the filing of further affidavits’. I could find no similar provision in the Tribunal’s rules.

[52] Unlike the high court (as also this Court and the Constitutional Court), the Tribunal (like the Magistrates Court) has no inherent jurisdiction to regulate its own process in the interests of justice. The power of the high court in that regard, is derived from the common law and now entrenched in s 173 of the Constitution. In terms of this power, the high court, which has always been able to regulate its own proceedings for a number of reasons; including, catering for circumstances not adequately covered by the rules, as also, generally ensuring the efficient administration of a court’s judicial functions.³¹ It also has the power, unlike the Tribunal, in the exercise of its inherent jurisdiction to grant procedural relief where the rules of court make no provision for it.³²

[53] As far the high court goes, it has come to be accepted that it is in the interests of the administration of justice that the well-known and well-established general rules regarding the number of set of affidavits and the proper sequence of affidavits should ordinarily be observed (*James Brown & Hamer (Pty) Ltd v Simmons NO*).³³ As it was put in the last-mentioned case:

³¹ *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) para 40.

³² *Carmel Trading Company Ltd v Commissioner for the South African Revenue Services and Others* [2007] ZASCA 160; [2007] SCA 160 (RSA); [2008] 2 All SA 125 (SCA); 2008 (2) SA 433 (SCA).

³³ *James Brown & Hamer (Pty) Ltd v Simmons NO* 1963 (4) SA 656 (A) at 660E-H.

‘Where, as in the present case, an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering it is seeking, not a right, but an indulgence from the Court: he must both advance his explanation of why the affidavit is out of time and satisfy the Court that, although the affidavit is late, it should, having regard to all the circumstances of the case, nevertheless be received. Attempted definition of the ambit of a discretion is neither easy nor desirable. In any event, I do not find it necessary to enter upon any recital or evaluation of the various considerations which have guided provincial Courts in exercising a discretion to admit or reject a late tendered affidavit (see eg authorities collated in *Zarug v Parvathie* 1962 (3) SA 872 (N)). It is sufficient for the purposes of this appeal to say that, on any approach to the problem, the adequacy or otherwise of the explanation for the late tendering of the affidavit will always be an important factor in the enquiry.’

[54] The principles distilled from the cases dealing with the high court practice offer guidance as to the manner in which the magistrates court should exercise its discretion under rule 55(1)(i). The relevant considerations are set out in *Porterstraat 69 Eiendomme v PA Venter Worcester*.³⁴

[55] Thus, had this matter served before either the high court or the magistrates court, the NCR would not have been entitled as of right to file a further affidavit. Whether such permission would be granted in a given case is basically a question of fairness to both sides.³⁵ Normally, the circumstances would have to be exceptional.³⁶ It has been observed that ‘a litigant who seeks to serve an additional affidavit is under a duty to provide an explanation that negatives *mala fides* or culpable remissness as the cause of the facts and/or information not being put before the Court at an earlier stage’.³⁷ There must furthermore be a proper and

³⁴ *Porterstraat 69 Eiendomme v PA Venter Worcester* 2000 (4) SA 598 (C) at 617B-F.

³⁵ *Bangtoo Bros. and Others v National Transport Commission* 1973 (4) SA 667 (N) at 680A-B.

³⁶ *Ebrahim (Pty) Ltd v Mahomed and Others* 1962 (1) SA 90 (D) at 92A-B.

³⁷ *Standard Bank of SA Ltd v Sewpersadh and Another* 2005 (4) SA 148 (C) para 10 and the cases there cited.

satisfactory explanation as to why the information contained in the affidavit was not put up earlier, and what is more, the Court must be satisfied that no prejudice is caused to the opposite party that cannot be remedied by an appropriate order as to costs.³⁸

[56] The statements of the NCR in this matter, fall far short of a satisfactory explanation as to why it was unable to secure the information prior to deposing to the founding affidavit, the preparation of the original notice of motion, and the launching of the application for the deregistration of the respondents. By that stage, the investigation by the NCR into the conduct of the respondents had been completed. Still less do they furnish a satisfactory explanation as to why, at any rate, the ‘new’ information was not included in the replying affidavit. What is more, as the following excerpt makes plain, the NCR sought in some respects to advance a ‘new case’ in the supplementary founding affidavit:

- ‘4. I am deposing to this affidavit to include following, which was not included in the Applicant’s original founding affidavit:
- 4.1. That the Respondents repeatedly contravened Section 106(5)(c) and 106(1)(b)(ii) of the Act;
 - 4.2. That the Respondents have repeatedly contravened section 99(1)(b), as an alternate contravention in the event that the Tribunal finds that the Respondents’ credit agreements are pawn transactions;
 - 4.3. To include a more detailed explanation as to why the Applicant submits that the Respondents’ agreements are secured credit agreements, not pawn transactions.’

[57] The NCR accordingly sought orders, in addition to those in the initial notice of motion, that the respondents had repeatedly contravened ss 106(5)(c) and 106(1)

³⁸ Ibid.

(b)(ii) of the Act, and in the alternative, that the respondents repeatedly contravened s 99(1)(b).

[58] Accordingly, had this matter served before the high court it is doubtful that the prospects of the admission of the supplementary founding affidavit would have necessarily led to a more expeditious resolution of the matter or that admitting it into evidence would not have been unduly prejudicial to the respondents. As the Tribunal misconceived the nature of the enquiry, it failed to consider whether: firstly, it had the power to permit the NCR to file a supplementary founding affidavit; secondly, the source, nature, extent and scope of such power; and, thirdly, assuming that it had such power, the relevant considerations that it had to have regard to in exercising that power.

[59] In the circumstances, the order by the high court remitting the matter to the Tribunal, albeit for different reasons, must stand. Accordingly, the appeal must fail. As to costs: There was no appearance on behalf of the respondents at the hearing of the appeal. Moreover, as the parties had misconceived the issue, the point held to be decisive in the appeal had not been raised by them. Consequently, there should be no order as to costs in the appeal.

[60] In the result, the appeal is dismissed.

V M PONNAN
JUDGE OF APPEAL

Appearances

For appellant:	K Kollapen
Instructed by:	VDT Attorneys, Pretoria Phatshoane Henney Attorneys, Bloemfontein
For second and third respondent:	No appearance
Instructed by:	J I Van Niekerk Attorneys, Pretoria Van Wyk & Preller Attorneys, Bloemfontein.