



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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

Today the Supreme Court of Appeal (SCA) dismissed an appeal by the appellant, against the order of the Gauteng Division of the High Court, Pretoria (the high court). It had upheld a review against the National Consumer Tribunal (the Tribunal), which had granted condonation to the appellant, the National Credit Regulator (the NCR) for the filing of a supplementary founding affidavit (the supplementary affidavit).

The second respondent, Elevation Trading CC t/a Xcelsior Financial Services (Elevation) and the third respondent, Xcelsior Financial Services (Pty) Ltd (Xcelsior) (the respondents), are registered credit providers under the National Credit Act 34 of 2005 (the Act).

The NCR received complaints against the respondents which related to various contraventions of the Act. The NCR instituted an investigation against the respondents. Upon conclusion of the investigation, the NCR produced a report and referred the matter to the Tribunal. It filed an application in terms of s 57(1) of the Act, seeking the cancellation of the respondent's registration as a credit provider. The respondents opposed the referral application and filed an answering affidavit. The NCR filed a replying affidavit and the matter was postponed and re-enrolled for hearing on 15 July 2019.

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 the filing of the supplementary affidavit. This application was opposed by the respondents who submitted that, as a creature of statute, the Tribunal did not have the power to allow the filing of the supplementary affidavit.

The application succeeded before the Tribunal, which took the view that the Act and rule 34(1)(d) of the Rules (for the Conduct of Matters Before the National Consumer Tribunal), provided the Tribunal with the power to condone 'any departure from its rules and procedures, on good cause shown. The respondents brought a review to set aside the Tribunal's decision, which succeeded in the high court.

The issue for determination before the SCA was whether the Tribunal had the power to grant condonation for the late filing of the supplementary founding affidavit.

In the majority judgment penned by Ponnann JA (Hughes JA and Nhlangulelel AJA concurring), the SCA held that rule 34(1)(d) does not apply to such an application because, even though it was under the guise of a condonation application, the NCR was seeking the permission 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. The majority held that, unlike the high court, the Tribunal has no inherent jurisdiction to regulate its own process. Additionally, the majority held that the Tribunal misconceived the nature of the enquiry as it failed to consider whether it had the power to permit the NCR to file a supplementary founding affidavit; it questioned the source, nature, extent and scope of such power and, assuming that it had such power, the relevant considerations that it had to have regard to in exercising that power.

In the result, the majority judgment dismissed the appeal with no order as to costs.

The minority judgement penned by Weiner JA (Mbatha JA concurring) reasoned that the proceedings in the Tribunal are required, in terms of the Act, to be expeditious and informal. Thus a more flexible approach should be required in relation to the pleadings filed. This judgment further held that the approach adopted in the majority judgment, seeks to place a restriction on the powers of the Tribunal and adopt a strict approach, as one might do in civil proceedings which flies in the face of the express provisions of the Act.

It held that the supplementary founding affidavit did not contain any new information as the facts relating to each of the contraventions mentioned were contained in the founding affidavit. If the appeal was refused, the NCR would be compelled to either bring an application for an amendment or one in terms of rule 10 which would have the same result as the condonation sought, but would be contrary to the express provisions of the Act for the proceedings to be conducted expeditiously and informally.

In the last instance, the minority judgment held that, 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. It was therefore in the interests of justice that the NCR be granted condonation and be permitted to supplement its founding affidavit. It held further that the Tribunal had exercised a discretion with which the high court was not at large to interfere. In addition, the Tribunal's decision was interlocutory, not final in effect, and not reviewable.

In the result, the minority judgment held that the Tribunal correctly exercised the general powers of condonation contained in the rules and the Act and it and would have upheld the appeal and set aside the order of the high court.

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