COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CRP034Jun15/CON211Nov16

In the condonation application of:

MASSMART HOLDINGS LIMITED Applicant

and

SHOPRITE CHECKERS PROPRIETARY LIMITED Respondent

In the matter between:

MASSMART HOLDINGS LIMITED Applicant

and

SHOPRITE CHECKERS PROPRIETARY LIMITED First Respondent
PICK 'N PAY RETAILERS PROPRIETARY LIMITED Second Respondent
SPAR GROUP LIMITED Third Respondent
SOUTH AFRICAN PROPERTY OWNERS ASSOCIATION Fourth Respondent

Panel : Norman Manoim (Presiding Member)
: Yasmin Carrim (Tribunal Member)
: Mondo Mazwai (Tribunal Member)
Heard on : 21 February 2017
Reasons Issued on : 22 March 2017

Reasons for Decision – Condonation Application

Introduction

[1] This case raises the issue of whether the Tribunal has the power to condone the late filing of a pleading when the time period for compliance was set out in a prior order of the Tribunal. The applicant, Massmart Holdings Limited ('Massmart') seeks such condonation. The application is opposed by one of the respondents, which alleges we do not have this power.

[2] On 21 February 2017, we issued our order granting condonation. Our reasons for doing so now follow.

Background

[3] On 09 June 2015, the applicant Massmart filed a complaint referral with the Competition Tribunal against the respondents. This was pursuant to a non-referral of its complaint lodged with the Competition Commission. We will refer to this for simplicity, as the 'main matter', to distinguish it from the present matter, which only involves the applicant and one of the respondents, the first respondent, Shoprite Checkers (Pty) Limited ('Shoprite').

[4] None of the respondents in the main matter have filed answering papers. Instead all three filed exceptions to the complaint referral and two, including Shoprite, filed a stay of the matter on the basis that its subject matter overlapped with that of a pending market enquiry into the retail sector.

[5] The Tribunal heard the exceptions in the main matter on 26 and 27 July 2016 and gave its order on 01 September 2016. The respondents were unsuccessful in their stay application, but were partially successful in their exceptions.[1]

[6] Pursuant to that matter and germane to the present one was the following paragraph in our order which we set out below.

[1] Our reasons for this decision can be found in CRP034Jun15/EXC088Jul15/EXC107Aug15/EXC109Aug15/STA204Dec15.

"***ORDER***

1. *The applications for exception are partially upheld. Massmart is given leave to amend its referral affidavit in accordance with the guidance provided, subject to it doing so within 40 business days from date of this decision."*

[7] Massmart was unable to file its amended referral within the 40 business day period provided for in the order. Shortly before the expiry of this period, on 20 October 2016, Massmart's attorneys addressed a letter to the Tribunal to request an extension of time from the date of expiry of the period, 27 October 2016, to 10 November 2016 (10 business days) to file its amended referral due to logistical difficulties, discussed in greater detail below. None of the respondents objected and the Tribunal directed that Massmart could do so. Massmart did not file within this period either. Instead it wrote to the all the respondents to request an additional 3 business days. This time Shoprite and Pick n Pay objected. Massmart's attorneys agreed to apply for condonation and hence the present application. Shoprite is the only one of the three respondents to oppose the application.[2]

Legal basis for the application

[8] Massmart brought the application in terms of Rule 54(1) of the Tribunal Rules. This rule states:

> *"A party to any matter may apply to the Tribunal to condone late filing of a document, or to request an extension or reduction of the time for filing a document, by filing a request in Form CT6."*

The basis of Shoprite's opposition

[9] Ordinarily in a condonation application, we would first consider the applicant's reasons. In this case however Shoprite's objection is primarily jurisdictional and hence this argument needs to be considered first, before we can deal with the merits of the application.

---

[2] Despite Pick n Pay's original objection to the request for an extension of time in correspondence, it did not oppose the condonation application once it was brought.

[10] Shoprite argues that the application for condonation amounts to an application to vary an order of the Tribunal. This is because the Tribunal stated in peremptory terms in the order that the amended referral must be filed in 40 business days. Since condonation implies a departure from these terms, it must constitute a variation. The only power given to the Tribunal to vary any of its orders in the Competition Act, no 89 of 1998, ("the Act") is section 66, which states as follows:

"*(1) The Competition Tribunal, or the Competition Appeal Court, acting of its own accord or on application of a person affected by a decision or order, may vary or rescind its decision or order –*

(a) erroneously sought or granted in the absence of a party affected by it;
(b) in which there is ambiguity, or an obvious error or omission, but only to the extent of correcting that ambiguity, error or omission; or
(c) made or granted as a result of a mistake common to all of the parties to the proceeding."

[11] It is common cause that this application is not made in terms of section 66 and so it has no application to the present proceedings. That being the case, Shoprite argues, no other provision of the Act gives the Tribunal the power to vary its order. Although powers to condone non-compliance with time periods exist in the Act, these apply only to time periods set out in the Act and the rules of the Tribunal but not to orders of the Tribunal. Unlike a court of law the Tribunal is a creature of statute and cannot embellish its powers beyond those expressly conferred. Thus once the Tribunal had granted the order requiring compliance within 40 business days it was *functus officio* on this point. Shoprite argues further that even if it is wrong on its jurisdictional point, Massmart has failed to make out a satisfactory case for the granting of condonation. Finally, it argues it would face prejudice if condonation was granted, as it would still have to defend itself in the main matter.

Massmart's argument

[12] Massmart disputes all these contentions. First, Massmart does not consider the application for condonation to constitute an application for a variation of the Tribunal's order. Condonation and variation it argues are notionally different. The 40 day requirement does not constitute a substantive order, but a procedural one. Since it is procedural, non-compliance can be condoned in terms of the provisions of the Act, most notably sections 58(1)(c), 55(2), read with Rule 54 of the Tribunal rules. We consider later the relevant sections of the Act.

[13] Massmart contends the Act gives the Tribunal broad powers to run its own processes. These include the powers to remedy deficiencies in a party's compliance with procedural requirements. These powers do thus not require the Tribunal to invoke any inherent jurisdiction. To the extent that these powers in the Act require additional interpretation, this must be done in a manner consistent with the Constitution. Since the Constitution confers on a party the right to have access to the courts to determine a legal dispute, any interpretation of what the Tribunal's remedial powers are, must be interpreted in a manner consistent with upholding this right. As we point out later, if condonation is not granted, Massmart cannot exercise the opportunity the Tribunal gave it to remedy its referral. If the referral is not remedied, it remains excipiable, and thus susceptible to an application for dismissal, at the instance of the respondents.

[14] It argues that if condonation is competent, it has made out a factual basis for condonation. Finally, it denies that Shoprite has made out a case of prejudice.

Analysis

[15] Shoprite makes out two arguments on its jurisdictional point. First, that the application is really an application for variation of a Tribunal order under the guise of a request for condonation. Once that has been properly understood this means that section 66 is Massmart's only avenue for relief. However since Massmart agrees that there are limited instances where variation is competent under section 66, none of which are applicable in this case, Massmart has no other avenue for its relief.

[16] Having made this point, the second part of Shoprite's argument is focused on rebutting the case made out by Massmart. In essence, the argument is that none of these sections which Massmart seeks to rely on, confer the power to condone the late filing. This is because read literally, none expressly confers this power on the Tribunal in respect of its orders.

[17] There are several problems with Shoprite's approach. The first is the mischaracterisation of the relief being sought as an application for variation of the order. The relief sought by Massmart does not ask us to vary the order, but to condone non-compliance with its terms in respect of a time period. That is not variation in disguise; it is quite different in its juristic consequence. The effect of a variation would be to change the terms of the existing order. A condonation application leaves the order unchanged – it merely seeks to excuse non-compliance with one of its terms. In a variation order, the Tribunal asks whether grounds exist to change the original terms of the order. In a condonation application, we ask if there are reasons why we should condone the defaulting party's non-compliance with the order.

[18] Because Shoprite focused on the issue of variability, it has misconceived the real enquiry. This is to ask whether the condonation relates to performance of a substantive or procedural aspect of the order. The former is not susceptible to condonation, the latter is.

[19] The order in the exception application contains both kinds. Insofar as the order decided that the referral was deficient in certain respects – it was substantive

in nature. However the order also provided for Massmart to rectify this deficiency and laid down a time period in which it had to do so. This aspect is purely procedural. Nor does the peremptory language of the order make a difference to the fact that it is procedural. Courts have long recognised the difference between the two types of order and their juristic consequences.[3] There is no valid reason why the Tribunal should not follow the approach of the courts in this regard.

[20] Thus far we have just dealt with the manner in which Shoprite has misconceived what the application seeks to achieve. We now go on to consider its argument that the Tribunal nevertheless has no power to condone non-compliance with its orders, because the Act gives it no such powers, and as a creature of statute it cannot assume them.

[21] There is no dispute that the Tribunal can condone non-compliance with a time period set out in the Act or in the Tribunal rules.

[22] This much is made explicit by section 58(1)(c) of the Act which states:

"(1) In addition to its other powers in terms of this Act, the Competition Tribunal may –

(c) subject to sections 13(6) and 14(2), condone, on good cause shown, any non-compliance of -

(i) the Competition Commission or Competition Tribunal rules; or

(ii) a time limit set out in this Act."

[23] Granted the section does not expressly refer to orders of the Tribunal. This is the straw at which Shoprite clutches. However a sensible interpretation of that section would extend its application to time periods contained in Tribunal orders as well.

[24] Let us explain why this is so.

---

[3]See *Molaudzi v S* (CCT42/15) [2015] ZACC 20 at [33]: *"...inherent power to regulate process, does not apply to substantive rights but rather to adjectival or procedural rights. A court may exercise inherent jurisdiction to regulate its own process only when faced with inadequate procedures and rules in the sense that they do not provide a mechanism to deal with a particular scenario. A court will, in appropriate cases, be entitled to fashion a remedy to enable it to do justice between the parties."*

[25] There is no express provision for exceptions in the Tribunal rules. Nevertheless, it is a procedure that has been frequently adopted by the Tribunal, through a derivative Tribunal rule, Rule 55, which allows the Tribunal, where appropriate, to adopt High Court practice.[4]

[26] As in the High Courts, the practice in the Tribunal has long developed of giving the party whose pleading was the subject of a successful exception, where appropriate, the opportunity to rectify it. Since no time period is set out in the rules for rectification to be effected, the time period needs to be set out in the order that upholds the exception, as in the present case. Without this directory relief all the parties would be left in a state of limbo.

[27] Since rules of procedure for any adjudicative body generally provide time periods for performance of actions that are recognised under its rules, it follows as a matter of basic logic, that once the Tribunal allows for exceptions, through the backdoor of Rule 55, it must also, at the same time regulate the time periods which are consequential to the adoption of this procedure. Since by virtue of a rule (Rule 55) the Tribunal is empowered to supplement its rules, by way of adoption of a High Court rule, the distinction between the existing rules and the supplemented rules, becomes moot. There is no sensible reason why section 58(1)(c) of the Act should be interpreted as only applying to the former (existing rules), but not to the latter (supplemented rules).[5]

[28] Section 58(1)(c) exempts expressly only two types of time period. These are the time periods for the Commission's consideration of small and intermediate mergers. There is a sensible policy reason that exists for this exemption. The clock runs strictly against the Commission, so as not to delay merging parties' implementation of this type of merger.

---

[4] Rule 55(1) states "*If in the course of proceedings, a person is uncertain as to the practice and procedure to be followed, the member of the Tribunal presiding over the matter –*

(a) may give directions on how to proceed; and

(b) for that purpose if a question arises as to the practice or procedure to be followed in cases not provided for by these Rules, the member may have regard to the High Court Rules."

[5] The High Court Rules do provide for a time period for an amendment of a pleading as a result of an exception to be responded to, however there is also a discretion available to the Court for the imposition of a time period: Rule 28(6) "*Unless the Court otherwise directs, an amendment authorised by an order of the court may not be effected later than 10 days after such authorization.*"

[29] Of course Shoprite might argue that merger periods are not implicated in the present case. They are right. But there is some significance to be made of the legislature's express exemption of certain time periods from the power to be condoned. That is that the power to condone should be widely construed unless a strong rationale exists for limiting its ambit. The merger consideration rationale is such an example. But Shoprite by way of contrast is unable to come up with any rationale for its limited reading of section 58(1)(c), as only applying to existing rules and not to supplemented rules. The best it can come up with is that statutes must be given their ordinary meaning. But Shoprite conceded that had the order been drafted in less peremptory terms and contained some rider to it that permitted condonation, that would be competent. However this concession only exposes how formalistic its approach is. There is now no objection to an order providing for condonation of a period not found in the rules, as long as the order provides expressly for this. There is thus, unlike in the case of intermediate and small merger exemptions, no rationale for adopting its narrow interpretation other than a resort to blinkered literalism. This, as Massmart trenchantly observed, makes the law ridiculous. It is an approach that makes the Tribunal and the litigants who appear before it, slaves to formalism at the sacrifice of common sense.[6]

[30] We thus find that section 58(1)(c) must be read to apply to time periods contained in Tribunal orders as well by way of supplemented rules, and is not limited to existing rules.

[31] We can also identify this power in other provisions of the Act.

---

[6] See for instance the Constitutional Court's remarks in *Senwes* (*The Competition Commission v Senwes Limited* CCT 61/11 [2012] ZACC 6), which strongly suggests an approach where the Tribunal is the master of its own proceedings. If this interpretation of the Court's decision is correct, then by extension of the same principle, the Tribunal should interpret its powers to condone in a wider sense, consistent with its functions to hear matters informally and expeditiously. The Court held at paragraph 69: "*These provisions [sections 27, 52 and 55] indicate that there is indeed a material and significant difference between the Tribunal and civil courts. One of the functions of the Tribunal is to adjudicate on any conduct prohibited under Chapter 2 of the Act. In order to do so, the provisions for hearings referred to the Tribunal place an emphasis on speed, informality and a non-technical approach to its task. There is no indication in the Act that the interpretation and determination of the ambit of a referral should be narrowly or restrictively interpreted. Excessive formality would not be in keeping with the purpose of the Act.*"

[32] Section 55(2) of the Act grants the Tribunal a wide discretion in procedural matters. That section states:

"*The Tribunal may condone any technical irregularities arising in any of its proceedings.*"

[33] A failure to comply with a time period provided for in an order would seem to be a technical regularity that can be cured under this section of the Act as well.

[34] Thus the power to condone can be exercised by adopting a sensible reading of both sections 58(1)(c) and 55(2). Of course the application has been made in terms of Rule 54 of the Tribunal rules, whose language is more expansive than that of the two sections of the Act we have cited. We accept that Shoprite is correct that this rule cannot be used to expand on powers not granted by the statute. But our approach is not to do so. We have thus only relied on interpreting the statute as the source of this power, not the rule itself.

[35] However, to the extent that there may be any doubt as to whether the language of these sections admits of this interpretation, the proper approach is not to fall back on formalism, but to interpret the sections through the lens of the Constitution as Massmart has convincingly argued.

[36] Section 34 of the Constitution grants a person the right to have any dispute that can be decided by law to have access to the courts. This right extends as well to hearings of tribunals.[7] To read the Act in a manner that would deny the power to condone compliance with a time period would be a reading inconsistent with the exercise of this right. The reason we say so is that if Massmart is unable to make its case for condonation then its claim is effectively extinguished. This is so because the respondents can argue that a pleading found to be excipiable has not been cured, and if it has not been cured, it falls to be dismissed. Thus failing to recognise a right to apply for condonation is no mere procedural nicety.

---

[7] Section 34: "*Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.*"

It is in effect a denial of a party's constitutional right of access without it being given the opportunity to explain.

[37] We thus find that the grant of condonation does not amount to a variation of a Tribunal order in the manner contemplated in section 66 of the Act, and secondly that the Act, properly interpreted, and in a manner consistent with the constitutional right of access to courts, gives the Tribunal the power to grant condonation for failure to adhere to time periods set out in its orders.

The grounds for condonation

[38] Of course it does not follow that because we have the power to grant condonation that it is simply there for the asking. There must be a reasonable explanation for the non-compliance and no prejudice to the adverse parties. In most cases, where the period of non-compliance with a particular action is not disproportionate to that allowed for it, and if the adverse parties have no objection, condonation may be granted, even by informal means.[8]

[39] But in cases such as the present, where an opposing party does object, the matter has to be dealt with more formally.

[40] In the present case, Massmart originally sought a 10 business day extension.

[41] Massmart advanced the following reasons, in a letter to the Tribunal, dated 20 October 2016, for needing the first extension:

1. Unforeseen challenges arising from a recent change in senior management within Game; and
2. Limited availability of certain key individuals due to business commitments.

[42] None of the respondents objected to the extension and the Tribunal directed that Massmart could file on 10 November 2016 as requested. Then on 10

[8] Although Rule 54 describes a more formal process for condonation via a hearing our practice has only been to do so where an application is opposed. We have in unopposed cases conducted the hearing by way of correspondence from the parties where the basis for condonation is made out sufficiently for us to come to a decision. This is acceptable because the Act in section 55(2) exhorts the Tribunal to hear matters as expeditiously as possible (paragraph (a)) and permits it to conduct its hearings informally (paragraph (b)).

November 2016, on the date of the expiry of the first ten day period, Massmart, in a letter addressed to the Tribunal sought a further extension. This request was met with opposition by Shoprite and Pick n Pay. Massmart then indicated that it would file on 15 November 2016, essentially an extension of three business days.

[43] In applying for the further 3 day extension, Massmart relied on the same grounds. This means that Massmart has applied for condonation for filing 13 business days late in relation to a period of 40 business days that had been given to them for filing the amended referral.

[44] We consider Massmart's explanation for the delay reasonable given the complexity of the logistical arrangements that had to be made. Nor was the delay disproportionate to the time allowed for the remedial action. Despite opposing the application, Shoprite has not advanced any facts to dispute them. The most it did was to complain that Massmart had given the same justification for the 10 day extension as it did for the further three day extension sought. We fail to see why this is a problem. Massmart originally thought it could get everything done in 10 business days. It could not and needed another 3 business days. It then got everything done. We see no problem why the reasons given for the first delay could not equally apply to the second.

[45] We now turn to the second issue of whether there has been any prejudice to any of the respondents by the delay. For the benefit of Shoprite, we will assume the delay has been thirteen, not three business days, since Shoprite suggests condonation for the first extension was given without it being given sufficient opportunity to object. None of the other respondents has opposed the application. The only prejudice that Shoprite alleges is that it will still have to face the case against it if condonation is granted. That is not the type of prejudice that can be advanced to oppose condonation. Shoprite has had to defend the case since it was referred. Indeed Shoprite had, during the exception hearing, supported Spar's application to have the referral proceedings delayed pending the outcome of the market enquiry into the retail sector. It does not explain why if it was not animated by the need for expedition then, why it is now.

[46] The real question is whether Massmart's delay in complying with the time period has caused Shoprite prejudice in being able to conduct its defence. Shoprite has not made out any case for prejudice of this nature. Massmart fairly indicated that it had no objection to the respondents being given more time to file their answers. There are thus no facts put before us to suggest that the delay has prejudiced Shoprite from preparing its answer.

[47] Accordingly, we are satisfied that a reasonable explanation for the delay has been advanced and no respondent has been prejudiced.

Conclusion

[48] We find that:

(1) We have the power to grant condonation;

(2) That an appropriate case for condonation has been made out; and

(3) There is no prejudice to any of the respondents if condonation is granted.

Costs

[49] Both parties sought costs in this matter, including the costs occasioned by the employment of two counsel. We find that Massmart is entitled to these costs in this matter. Shoprite's opposition was without legal or factual foundation and has resulted in further costs being incurred unnecessarily by Massmart and imposed a burden on public resources, by the need to have a hearing on an issue that parties ought reasonably to be able to negotiate amongst themselves.

Order

[50] Our order in this matter was granted on 21 February 2017. This was done prior to these reasons being issued to prevent further delay in the exchange of pleadings. For convenience a copy is attached again to these reasons, although dated earlier.

Mr Norman Manoim

22 March 2017
DATE

Ms Yasmin Carrim and Ms Mondo Mazwai concurring

Case Manager:	Kameel Pancham
For Applicant:	Mr F. Snyckers SC and Ms N. Muvangua instructed by Cliffe Dekker Hofmeyr
For the Respondent:	Mr L. Kuschke SC and Ms G. Engelbrecht instructed by Werksmans Attorneys