

SOUTH AFRICA / JUDGMENT

Absa Bank Ltd v Sager and Others (NCT/108118/2018/165) [2018] ZANCT 50 (31 July 2018) [2018] ZANCT 50

COURT

National Consumer Tribunal

BEFORE

F Sibanda, J Simpson, A Potwana

CASE / FILE NUMBER

NCT/108118/2018/165

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Policy

IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

number: NCT/108118/2018/165

In

the matter between:

ABSA
BANK LTD
APPLICANT
and
BENAY
SAGER (NCRDC 2484)
1ST
RESPONDENT/ DEBT COUNSELLOR
NIMESH
KANTILAL KESHAV
ID
[...]
2ND

RESPONDENT/1ST CONSUMER
DEEPTI
KESHAV
ID
[...]
3RD
RESPONDENT/2ND CONSUMER
DIRECT
AXIS (SA) (PTY) LIMITED ON BEHALF OF FIRSTRAND BANK LTD
JET,
ON BEHALF OF EDCON (PTY) LTD
4TH
RESPONDENT/CREDIT PROVIDER
5TH
RESPONDENT/CREDIT PROVIDER
RCS
CARDS (PTY) LTD
STANDARD
BANK OF SOUTH AFRICA LIMITED
TRUWORTHS
LIMITED
WESBANK,
A DIVISION OF FIRSTRAND BANK LTD
6TH
RESPONDENT/CREDIT PROVIDER
7TH
RESPONDENT/CREDIT PROVIDER
8TH
RESPONDENT/CREDIT PROVIDER
9TH
RESPONDENT/CREDIT PROVIDER

Coram:

Mr.
F Sibanda
-
Presiding Member
Adv.
J Simpson
-
Tribunal Member
Mr.
A Potwana
-
Tribunal Member
Date
of Hearing
-
31 July
2018

JUDGMENT**AND REASONS****APPLICANT**

1. The Applicant in this matter is ABSA Bank Limited, a registered credit provider (hereinafter referred to as “the Applicant” or “ABSA”).
2. At the hearing ABSA was represented by an attorney, Ms Tanya Verdoorn of Hammond Pole attorneys.

RESPONDENTS

3. The 1st Respondent is the debt counsellor for the 2nd and 3rd Respondents, who are the consumers under debt review. The 3rd to 9th Respondents are all registered credit providers (hereinafter all collectively referred to as “the Respondents”).
4. There was no appearance by any of the Respondents or any representatives on their behalf at the hearing.

APPLICATION TYPE

5. The Applicant brought an application in terms of Section 165 of the National Credit Act[1] to the Tribunal to rescind the debt re-arrangement agreement, which was made an order of the Tribunal on 26 June 2017 under case number NCT/46982/2016/138.

CONSIDERATION OF THE EVIDENCE ON A DEFAULT BASIS

6. On 30 May 2018, the Applicant filed the Section 165 application with the Tribunal. The Application was served on the Respondents by email (by consent) on 31 May 2018. The Registrar issued a notice of filing to the parties on 1 June 2018. A notice of set down was issued to all the parties on 25 June 2018. Based on submissions made by the Applicant in the hearing it appears that the Applicant initially filed and served the application on all the parties in April 2018. They were then informed by the Registrar that one of the email addresses was incorrect. ABSA then resent the application by e-mail to all the parties on 31 May 2018.
7. In terms of Rule 13 of the Rules of the Tribunal[2], the Respondents had to respond to the application within 15 business days by serving an answering affidavit on the Applicant. The Respondents however failed to do so.
8. The Applicant did not file an application for a default order in terms of Rule 25(2).
9. The Registrar however set the matter down for hearing on a default basis due to the pleadings being closed.
10. Rule 13(5) provides as follows:

“Any fact or allegation in the application or referral not specifically denied or admitted in the answering affidavit, will be deemed to have been admitted”

11. Therefore, in the absence of any answering affidavit filed by the Respondents, the Applicant’s application and all of the allegations contained therein are deemed to be admitted.
12. The Tribunal is satisfied that the application was adequately served on the Respondents. The matter therefore proceeded on a default basis.

BACKGROUND

13. During May 2016, the debt counsellor, Mr Benay Sager, applied for an order confirming the debt restructuring agreement between the parties as an order of the Tribunal. The order was granted by the Tribunal on 26 June 2017 under case number NCT/46982/2016/138.
14. The order granted contains a reference to ABSA account number 86954554 with an outstanding balance of R500 235.45 which is repayable with a single instalment of R4 228.56 at an interest rate of 9.01%. ABSA submits that this order was based on an acceptance letter from ABSA at the time which was clearly issued in error. ABSA submits that the letter was issued in error and the repayment as indicated was not agreed to between the parties. After it realised the error in the order it sent numerous letters to the debt counsellor making a counter proposal but these letters were not responded to. ABSA requests that the order be rescinded as it was

sought in error by the debt counsellor.

APPLICABLE SECTIONS OF THE ACT

15. The application is brought in terms of Section 165 of the Act, which states:

“Variation of order

The Tribunal, acting of its own accord or on application by 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 the parties to the proceedings”.

CONSIDERATION OF SECTION 165 OF THE ACT

16. Section 165 of the Act provides for a rescission or variation of an order granted by the Tribunal “acting of its own accord or on application by a person affected by a decision or order.” Section 165 further prescribes that such a rescission or variation may only be granted in the following instances:

16.1 When the order of the Tribunal had been erroneously sought or granted in the absence of a party affected by it;

16.2 There is ambiguity, or an obvious error or omission, but only to the extent of correcting that ambiguity, error or omission; or

16.3 Made or granted as a result of a mistake common to all the parties to the proceedings.

Consideration of the evidence

17. It is clear from the evidence that the letter issued by ABSA was incorrect. Neither of the parties to this order would have intended that a debt of R500 235.45 would be repaid with one instalment of R4 228.65. Further, the initial proposal made by the debt counsellor to ABSA in 2016 proposed 75 repayments of R8 945.23 on this debt. It is clear that the order sought by the debt counsellor at the time was erroneous and not in accordance with the agreed repayment structure between the parties.
18. ABSA has made subsequent repayment proposals to the debt counsellor which have not been accepted. The new payment proposal will have an effect on the financial situation of the consumers. The order can therefore not simply be varied. The order will have to be rescinded and the debt counsellor will have to make a new proposal to the credit providers.
19. In accordance with section 165(a) of the NCA, the order dated 26 June 2016 must therefore be rescinded, as the application was erroneously sought by the debt counsellor in the absence of ABSA.

ORDER

20. Accordingly, the Tribunal makes the following order:-

20

20.1 The application to rescind the order is granted. The order confirming the debt re-arrangement as an order of the Tribunal, case number NCT/46982/2016/138, dated 26 June 2017 is hereby rescinded.

20.2 There is no order as to costs.

Thus done and signed at Centurion on 31 July 2018.

{signed}

Adv. J Simpson

Tribunal Member

Mr. F Sibanda (Presiding Tribunal Member) and Mr. A Potwana (Tribunal Member) concurring.

[1] Act 34 of 2005 (hereinafter referred to “the Act”).

[2] 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.

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