

SOUTH AFRICA / JUDGMENT

Capitec Bank Limited v Gardner and Others (NCT/133226/2019/165) [2019] ZANCT 125 (14 August 2019) [2019] ZANCT 125

COURT

National Consumer Tribunal

BEFORE

H Devraj, K Moodaliyar, B Dumisa

CASE / FILE NUMBER

NCT/133226/2019/165

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

number: NCT/133226/2019/165

NCA

In

the matter between: CAPITEC
BANK
LIMITED
APPLICANT
And
CLARK
GARDNER 1STRESPONDENT
(NCRDC 44)
DAN
TEBOGO
MAZIBUKO 2ND
RESPONDENT
TRUWORTHS
LIMITED 3RD
RESPONDENT

Coram: Ms
H Devraj - Presiding Tribunal Member
Prof
K Moodaliyar - Tribunal Member
Prof
B Dumisa - Tribunal Member
Date
of Hearing - 30 July 2019
Date
of Judgment - 14 August 2019

JUDGMENT

AND REASONS

APPLICANT

1. The Applicant in this matter is Capitec Bank Limited, a registered credit provider (hereinafter referred to as “the Applicant”).
2. At the hearing; the Applicant was represented by Mr T Sehlabela; a candidate attorney from Hammond Pole Attorneys.

RESPONDENTS

3. The 1st Respondent is Clark Gardner, a registered Debt Counsellor; (hereinafter referred to as “the Debt Counsellor). The 2nd Respondent is Dan Tebogo Mazibuko; a consumer under debt review (hereinafter referred to as “the Consumer”).
4. The 3rd Respondent is a registered credit provider.
5. There was no appearance by the Debt Counsellor; the Consumer; the Credit Provider; or their representatives at the hearing.

APPLICATION TYPE

6. This is an application in terms of Section 165 of the National Credit Act, 2005 (NCA) to rescind the debt re-arrangement agreement; which was made an order of the Tribunal on 20 November 2018 under case number NCT/117160/2018/138(1).

CONSIDERATION OF THE EVIDENCE ON A DEFAULT BASIS

7. On 30 May 2019, the Applicant filed the application with the Tribunal. The application was served on the 1st and 2nd Respondents by registered mail on 17 May 2019; and on the 3rd Respondent via email on 16 May 2019, with consent. On 23 May 2019 the Tribunal's Registrar issued a notice of filing to all the parties.
8. In terms of Rule 13 of the Rules of the Tribunal,[1] the Respondents had 15 business days to serve an answering affidavit and file the same with the Tribunal's Registrar. The

Respondents however failed to do so.

9. The Applicant did not file an application for a default order in terms of Rule 25(2).
10. On 1 July 2019 the Tribunal's Registrar issued a notice of set down to all the parties setting the matter down for hearing on a default basis for 30 July 2019, due to the pleadings being closed.
11. On the date of the hearing the Tribunal was satisfied that the application was adequately served on the Respondents and the matter proceeded on a default basis.
12. Rule 13(5) provides that:

"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"

13. Therefore, in the absence of any answering affidavits filed by the Respondents, the Applicant's application and all of the allegations contained therein are deemed to be admitted.

BACKGROUND

14. The Applicant submitted that the Consumer entered into a loan agreement with account number [...]. The Consumer experienced difficulty in meeting his repayment terms and applied for debt review. The Applicant received a NCR Form 17 proposal from the Debt Counsellor; informing the Applicant that the consumer had applied for debt review. On 29 January 2015; the Applicant consented to a restructured payment arrangement to be made an order of the Tribunal. According to the Applicant; the Consumer failed to pay the Capitec Bank Limited loan agreement with account number [...]; as per the repayment terms of the consent letter dated 29 January

2015. On 21 October 2015; the Applicant gave notice to the Debt Counsellor and the Consumer; of termination of the Debt Review process; in terms of Section 86(10) and 86(3) of the Act.

15. The Applicant averred that the Debt Counsellor filed the original Section 138 consent order application with the Tribunal on 10 October 2018; after it had terminated the debt review process on 21 October 2015.

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.

These grounds will be detailed under separate headings:

17. Erroneously sought or granted

The courts have held that in an application for variation or rescission of an order, the Applicant bears the onus of establishing that the order was erroneously granted.[2] The court considered the meaning of the words "erroneously granted". This is dealt with in the Bakoven-case[3] where it was stated:

"An order or judgment is 'erroneously granted' when the Court commits an 'error' in the sense of 'a mistake in a matter of law appearing on the proceedings of a Court of record' (The Shorter Oxford Dictionary). It follows that a Court in deciding whether a judgment was 'erroneously granted' is, like a Court of Appeal, confined to the record of proceedings. In contradistinction to relief in terms of Rule 31(2)(b) or under the common law, the applicant need not show 'good cause' in the sense of an explanation for his default and a bona fide defence (Hardroad (Pty) Ltd v Orihi Motors (Pty) Ltd (supra) at 578F-G; De Wet (2) at 777F-G; Tshabalala and Another v Pierre 1979

(4) SA 27 (T) at 30C-D). Once the applicant can point to an error in the proceedings, he is without further ado entitled to rescission."

Accordingly the words "erroneously granted" mean that the Tribunal must have committed an error or mistake in law. The court, in the matter of First National Bank of SA Bpk v Jurgens and Another,[4] the learned Judge Leveson stated:

"That leaves me only with the task of considering para (a) of the same sub-rule which makes provision for rescission or variation of an order or judgment erroneously sought or erroneously granted. I look first at the remedy available before the rule came into force. Ordinarily a court only had power to amend or vary its judgment if the court had been approached to rectify the judgment before the Court had risen. That relief was available at common law and with the only relief that could be obtained until the provisions of rule 42 were enacted. The proposition at common law is simply that once a court has risen it has no power to vary the judgment for it is functus officio. Firestone South Africa (Pty) Ltd v Genticuro AG, 1977(4) SA 298 (A). A principal judgment could be supplemented if an accessory had been inadvertently omitted, provided that the court was approached within a reasonable time. Here the judgment was granted two years ago and a reasonable time has expired. The question then is whether the limited relief at common law has been extended by this provision. In the first place I must express considerable doubt that power exists in the Rules Board to amend the common law by the creation of a Rule. Leaving aside that proposition, however, the question that arises is whether the present case is one of a judgment 'erroneously sought or granted', those being the words used in Rule 42(1)(a). The ordinary meaning of 'erroneous' is 'mistaken' or 'incorrect'. I do not consider that the judgment was 'mistakenly sought' or 'incorrectly sought'. The relief accorded to the plaintiff was precisely the relief that its counsel requested. The complaint now is that there is an omission of an accessory feature from the judgment. I am unable to perceive how an omission can be categorised as something erroneously sought or erroneously granted. I consider that the rule only has operation where the applicant has sought an order different from that to which it was entitled under its cause of action as pleaded. Failure to mention a form of relief which would otherwise be included in the relief granted is not in my opinion such an error."

18. Ambiguity, or an obvious error or omission, but only to the extent of correcting that ambiguity, error or omission

This ground for variation is clearly applicable in instances where an order granted by the Tribunal is vague or uncertain, or an obvious error occurred in the granting thereof. The applicable provision is unambiguous in stating that the order will only be varied to the extent of such an ambiguity, error or omission.

19. Mistakes common to all the parties to the proceedings.

The applicable provision relates to an error which occurred in the granting of the order and requires that the error is common to all the parties.

CONSIDERATION OF THE EVIDENCE

20. It appears from the contents of the Section 138 application case file that the Consumer signed the Power of Attorney giving the Debt Counsellor authority to institute debt review proceedings on 13 November 2014. The Applicant issued the termination notices on 21 and 30 October 2015 to the Debt Counsellor and Consumer. The debt review process was legally terminated 60 days after the consumer applied for debt review. It follows that; the Debt Counsellor was not supposed to include the Capitec Bank Limited loan

agreement with account number [...] in the Section 138 application to the Tribunal.

21. Although the Debt Counsellor's reasons for filing the application for a consent order after the Applicant had served the notice of termination is not known; the Debt Counsellor not having filed any papers in the present matter; the balance of probabilities favours the conclusion that; the consent order was erroneously sought.
22. If an order was erroneously sought it can be rescinded in accordance with section 165(a) of the NCA.

ORDER

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

- a) The consent order made on 20 November 2018 under case number NCT/117160/2018/138(1) is hereby rescinded; and
- b) There is no order made as to costs.

Thus done and signed at Centurion on 14 August 2019

{signed}

Ms H Devraj

Presiding Tribunal Member

Prof K Moodaliyar (Tribunal Member) and Prof B Dumisa (Tribunal Member) concurring.

[1] 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.

[2] Bakoven Ltd v G J Howes (Ptv) Ltd 1990(2) SA 446 at page 469 B.

[3] Bakoven Ltd v G J Howes (Ptv) Ltd 1990(2) SA.

[4] 1993(1) SA 245 at page 246 to 247.

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