

SOUTH AFRICA / JUDGMENT

Sager and Another v Absa Bank Limited and Others (NCT/120384/2018/165) [2019] ZANCT 19 (4 March 2019)

[2019] ZANCT 19

COURT

National Consumer Tribunal

BEFORE

A Potwana, H Devraj, T Bailey

CASE / FILE NUMBER

NCT/120384/2018/165

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Policy

IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

number: NCT/120384/2018/165

In

the matter between:

BENAY
SAGER APPLICANT
NCRDC
2484
ANGELA
EVELYN
MLANGENI CONSUMER

ID: [...]
and
ABSA
BANK
LIMITED 1ST
RESPONDENT
EDCON
(PTY)
LTD 2ND
RESPONDENT
FOSCHINI
RETAIL GROUP (PTY) LTD
3RD
RESPONDENT
PRES
LES (PTY)
LTD 4TH
RESPONDENT
SANLAM
PERSONAL LOANS (PTY)
LTD 5TH
RESPONDENT
STANDARD
BANK OF SOUTH AFRICA LIMITED 6TH
RESPONDENT
WOOLWORTHS
(PTY)
LTD 7TH
RESPONDENT
WOOLWORTHS
FINANCIAL SERVICES (PTY) LTD 8TH
RESPONDENT

Coram: Mr
A Potwana
-
Presiding Tribunal Member
Ms
H Devraj
-
Tribunal Member
Mr
T Bailey
-
Tribunal Member
Date
of Hearing
-
14
February 2019
Date

of Judgment

-

4 March
2019

JUDGMENT

AND REASONS

APPLICANT

1. The Applicant in this matter is Benay Sager a registered Debt Counsellor, (hereinafter referred to as the Applicant). The Applicant

made the application on behalf of the consumer, Ms Angela Evelyn Mlangeni, (hereinafter referred to as the “Consumer”).

2. At the hearing of the matter the Applicant was represented by Ms Faeda Charles, an employee of the Applicant.

RESPONDENTS

3. The 1st to 8th Respondents are all registered with the National Credit Regulator as credit providers in terms of the National Credit Act[1] (hereinafter collectively referred to as “the Respondents”).
4. There was no appearance by any of the Respondents or their representatives at the hearing.

APPLICATION TYPE

5. This is an application in terms of Section 165 of the National Credit Act 34 of 2005 (hereinafter referred to as “the Act”) to vary the debt re-arrangement agreement; which was made an order of the Tribunal on 2 March 2017 under case number NCT/73665/2017/138.

CONSIDERATION OF THE EVIDENCE ON A DEFAULT BASIS

6. On 20 November 2018; the Applicant filed the application with the Tribunal. The application was served on the Respondents via email on 20 November 2018.
7. In terms of Rule 13 of the Rules of the Tribunal,[2] 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.

8. The Applicant did not file an application for a default order in terms of Rule 25(2).
9. On 4 January 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 due to the pleadings being closed.

10. On the date of the hearing; the Presiding Tribunal member was satisfied that the notice of set down was adequately served on the Respondents; and the matter proceeded on a default basis.
11. 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”
12. 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.

BACKGROUND

13. The Debt Counsellor, Mr Benay Sager, applied for an order confirming the debt restructuring agreement between the Consumer and the Respondents as an order of the Tribunal in January 2017. The order was granted by the Tribunal on 2 March 2017 under case number

NCT/73665/2017/138.

14. The Applicant has applied to have the order varied. The Applicant submitted that it used an incorrect acceptance letter for ABSA Bank Limited (Account number [...]); in that the details of the final acceptance letter were not captured on the consent order that was filed with the Tribunal. The details of the acceptance letter dated 5 December 2016 were used on the consent order. ABSA Bank submitted a final acceptance letter, dated 29 October 2018.
15. During the hearing, the Applicant then argued that the Tribunal confirmed the order based on a document named “Confirmation of account restructure” dated 13 December 2016 and that this is not an acceptance letter. Therefore there was an obvious error made and consequently, the Applicant wants the order to be varied in accordance with the new acceptance letter dated 29 October 2018.

APPLICABLE SECTIONS OF THE ACT

16. The application is brought in terms of Section 165(b) of the Act, which states -
“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.”

17. The original consent order was made in terms of Section 138(1) of the Act, which provides that;

“If a matter has been-

- (a) resolved through the ombud with jurisdiction, consumer court or alternative dispute resolution agent; or
- (b) investigated by the National Credit Regulator, and the National Credit Regulator and the respondent agree to the proposed terms of an appropriate order,

the Tribunal or a court, without hearing any evidence, may confirm that resolution or agreement as a consent order.”

CONSIDERATION OF SECTION 165 OF THE ACT

21. 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:

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- (a) When the order of the Tribunal had been erroneously sought or granted in the absence of a party affected by it;
- (b) 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.

These grounds will be detailed under separate headings below.

21.1 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.[3] The court considered the meaning of the words "erroneously granted". This is dealt with in the Bakoven-case[4] 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 Oriibi 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,[5] 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."

21.2 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.

21.3 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

22. Based on the evidence before the Tribunal; there was an acceptance letter by ABSA Bank Limited (Account Number [...]) dated 5 December 2016. There was another letter dated 13 December 2016. The letter of 13 December 2016 is named "Confirmation on account restructure". However, the content of the letter expressly states the following: "We confirm that we have accepted your re-arrangement agreement, subject to the repayment Terms and Special Conditions that is set below:-

Proposed Instalment Interest Rate Term (Months) R416.00 1.29% 12 Total minimum term 12

23. The Tribunal; in confirming the order, accepted the details of the letter dated 13 December 2016, as the final acceptance by ABSA Bank; as this letter supersedes the acceptance letter dated 5 December 2016. The Tribunal therefore correctly granted the order on 2 March 2017. The further acceptance letter by ABSA Bank dated 29 October 2018, cannot be accepted after the order was granted. Section 165 does not find application in such circumstances.

ORDER

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

24.1 The application to vary the consent order is refused; and

24.2 There is no order made as to costs.

Thus done and signed at Centurion on 4 March 2019.

{signed}

Ms H Devraj

Presiding Member

Mr. A Potwana (Tribunal Member) and Mr T Bailey (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.

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

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

[5] 1993(1) SA 245 at page 246 to 247.

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