

SOUTH AFRICA / JUDGMENT

Sager obo Mthembu and Another v Absa Bank Limited and Others (NCT/94589/2017/165) [2018] ZANCT 22 (26 February 2018)

[2018] ZANCT 22

COURT

National Consumer Tribunal

BEFORE

J Simpson, H Devraj, A Potwana

CASE / FILE NUMBER

NCT/94589/2017/165

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: NCT/94589/2017/165

In the matter between:

BENAY SAGER APPLICANT

NCR DC NUMBER: 2484

OBO

DEBORAH PATRICIA MTHEMBU 1st CONSUMER

ID:[...]

And

NTOKOZO SIFISO MTHEMBU 2nd CONSUMER

ABSA BANK LIMITED 1st RESPONDENT

AFRICAN BANK LIMITED 2nd RESPONDENT

DIRECT AXIS (SA)(PTY) LTD OBO FIRSTRAND 3rd RESPONDENT

BANK LIMITED

EDGARS OBO EDCON (PTY) LTD 4th RESPONDENT

FIRST NATIONAL BANK, A DIVISION OF FIRST 5th RESPONDENT

RAND BANK LIMITED

RCS CORICRAFT 6th RESPONDENT

WOOLWORTHS FINANCIAL SERVICES (PTY) LTD 7th RESPONDENT

Coram:

Adv J Simpson - Presiding Member

Ms. H Devraj - Member

Mr. A Potwana - Member

Date of Hearing - 29 January 2018

JUDGMENT AND REASONS

APPLICANT

1. The Applicant in this matter is Senay Sager, a registered debt counsellor (hereinafter referred to as the "Applicant").
2. At the hearing of the matter the Applicant was represented by Ms Faeda Charles, an employee of the Applicant.

CONSUMERS AND RESPONDENTS

3. The 1st and 2nd Consumers are the consumers who are under debt review {hereinafter referred to as "the Consumers".} The Respondents are all registered credit providers {hereinafter collectively referred to as "the Respondents"}.
4. There was no appearance by any of the Consumers or the Respondents nor were they represented at the hearing.

APPLICATION TYPE

5. The Applicant brought an application in terms of Section 165(1) of the National Credit Act[1] to the Tribunal to vary the debt re-arrangement agreement which was made an order of the Tribunal on 19 September 2017 under case number NCT/83928/2017/13.8

CONSIDERATION OF THE EVIDENCE ON A DEFAULT BASIS

6. On 07 November 2017, the Applicant filed the Section 165 application with the Tribunal. The Application was served on the Respondents by electronic mail. The Registrar issued a notice of complete filing to all the parties on 10 November 2017.

7. In terms of Rule 13 of the Rules of the Tribunal[2], the Respondents had 15 business days from the date of receiving the Application within which to serve 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. A notice of set down was issued to all the parties on 11 January 2018.
10. 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"
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 June 2017, the Applicant, 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 19 September 2017 under case number NCT/83928/2017/138.
14. The Applicant has now applied for the debt restructuring order to be varied by replacing the First National Bank, a division of Firststrand Bank Limited (hereinafter referred to as the First National Bank) account number [...] with account number [...]3.The

Applicant submits that the order granted contains an error in that, instead of an acceptance letter that reflects the names of the consumers, a wrong acceptance letter which belongs to another consumer was used. Indeed, the consumer's name on the FNB acceptance

letter with account number [...] is neither the first nor the second consumer's name. FNB account number [...]3, on the other hand, bears the second respondent's names.

APPLICABLE SECTIONS OF THE ACT

15. The application is brought in terms of Section 165{1}(a) 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... in which there is ambiguity, or an obvious error or omission, but only to the extent of correcting that ambiguity, error or omission..."
16. The original Application was filed as a consent order application 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 alternatively;(and)
- (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

17. Section 165 of the Act provides for a rescission or variation of an order granted by the Tribunal, 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:
- (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:

18. Erroneously sought or granted

- (1) 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 Jaw, the applicant need not show 'good cause' in the sense of an explanation for his default and a bona fide defence (Hardroad (Ply) 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. "

- (2) 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."

19. 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.

20. 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

21. It is clear from the evidence presented that a wrong acceptance letter was attached to the original application. The correct

acceptance letter from the First National Bank has now been attached and is dated 12 June 2017 which is prior to the date on which the order was granted. This is an obvious error falling under Section 165(b) of the Act.

22. The order can therefore be varied.

ORDER

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

23.1 The application to vary the order is granted. The varied order is attached as "Annexure A".

23.2 There is no order as to costs.

Thus done and signed at Centurion on 26 February 2018.

{signed}

Mr. A Potwana

Tribunal Member

Adv. J Simpson (Presiding Member) and Ms. H Devraj (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 (Pty) Ltd 1990(2) SA 446 at page 469 B.

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

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

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