

**IN THE NATIONAL CONSUMER TRIBUNAL
HELD IN CENTURION**

Case Number: NCT/9176/2013/165(1)(P)NCA

In the matter between:

KARIN LOUIS DE SOUZA

APPLICANT

and

STANDARD BANK OF SOUTH AFRICA LIMITED

RESPONDENT

Coram:

Ms D Terblanche – Presiding member

Adv J Simpson – Member

Ms H Devraj – Member

Date of hearing – 27 September 2013

JUDGMENT

APPLICANT

1. The Applicant is Karin Louis De Souza, a major female, residing in Witpoortjie, Roodepoort (hereinafter referred to as the "Applicant").
2. At the hearing the Applicant was represented by Advocate Goodwin.

RESPONDENT

3. The Respondent is Standard Bank of South Africa Limited, a registered credit provider with the National Credit Regulator (hereinafter referred to as "the Respondent").
4. There was no appearance by the Respondent or a representative at the hearing.

APPLICATION TYPE

5. The Applicant brought an application in terms of Section 165(1) of the National Credit Act¹ ("the Act") to the Tribunal to vary the debt re-arrangement agreement, which was made an order of the Tribunal on 06 November 2012.

BACKGROUND

6. During August 2012, the Applicant, through a registered debt counsellor, Andre Carlse, applied to the Tribunal for a debt re-arrangement agreement to be confirmed as an order of the Tribunal in terms of Section 138(1) of the Act, under case number NCT/6208/2012/138(1)(P). Presiding member, Advocate Neo Sephoti, confirmed the debt re-arrangement agreement as an order of the Tribunal on 06 November 2012.
7. During June 2013, the Applicant, through a registered debt counsellor, Andre Carlse, brought an application in terms of Section 165(1) to vary the debt re-arrangement that was made an order of the Tribunal on 06 November 2012.

APPLICABLE SECTIONS OF THE ACT

8. The application is brought in terms of Section 165(1)(c) of the Act, which states the following:

"Variation of order

165. 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

¹ Act 34 of 2005 (hereinafter referred to "the Act")

(c) made or granted as a result of a mistake common to all the parties to the proceedings”.

9. The Application² was initially filed as a consent order application in terms of Section 138(1) of the Act, which provides that;

“Consent orders

138. (1) *If a matter has been-*

- (a) resolved through the ombud with jurisdiction, consumer court or alternatively*
- (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.”*

THE HEARING

10. The matter was heard on 27 September 2013 in Centurion.

APPLICANT'S SUBMISSION

11. The basis of the Applicant's Application, as contained in the application form, can be summarised as follows:

11.1 The Applicant received an insurance pay out and made a deposit of R600 000.00 (Six Hundred Thousand Rand) into her Standard Bank Bond Account³, which was one of the debts under the debt re-arrangement agreement. She further made an arrangement with the Respondent to pay a lower instalment on the outstanding balance, outside of the debt review process.

11.2 The Applicant attached an e-mail dated 06 May 2013, from the Respondent, advising the Applicant that in order to exclude the Home Loan account from the debt review process, the Applicant will need to obtain a rescission order from the Tribunal.

12. The Applicant's Representative at the hearing, Advocate Goodwin made the following submissions:-

² NCT/6208/2012/138(1)(P)

³ Account number 362149429.

- 12.1 That the Respondent Standard Bank should be excluded from the original order that was granted.
- 12.2 The reason for the variation, is due to the Applicant being married out of community of property and an amount of R600 000 has been paid into the Standard Bank Home Loan Account. The reason therefore for excluding the Standard Bank Home Account is that it negatively impacts the credit record of the Applicant's husband.
- 12.3 It was initially submitted that the Standard Bank Home Loan Account should have been excluded from the debt re-arrangement process. However, it was conceded that there is and was no evidence on record at the time that the initial application was filed with the Tribunal, that the Standard Bank Home Loan Account should have been excluded from the debt re-arrangement process.

CONSIDERATION OF THE EVIDENCE ON A DEFAULT BASIS

13. On 02 October 2012, the Applicant filed the application with the Tribunal. Subsequently a Notice of Complete Filing was issued by the Registrar to both the Applicant and the Respondent on 08 October 2012.
14. In terms of Rule 13 of the Rules of the Tribunal, the Respondent had to respond within 15 days by serving an answering affidavit on the Applicant. The Respondent however failed to do so. There is an e-mail dated 06 May 2013 from the Respondent advising the Debt Counsellor that there is currently a court order in place and that the Respondent will require a Rescission Order to be able to exclude the Home Loan Account from the Debt Review Process.
15. The Applicant did not file an application for a default order in terms of Rule 25(2).
16. 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"
17. Therefore, in the absence of any answering affidavit filed by the Respondent, the Applicant's application and all of the allegations contained therein are deemed to be admitted.

CONSIDERATION OF SECTION 165 OF THE ACT

18. 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:

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

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

18.3 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:

19. 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.⁴ The court considered the meaning of the words "*erroneously granted*". This is dealt with in the *Bakoven-case*⁵ 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 Oribi 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*,⁶ the learned Judge Leveson stated:

⁴ Bakoven Ltd v G J Howes (Ptv) Ltd 1990(2) SA 446 at page 469 B.

⁵ Bakoven Ltd v G J Howes (Ptv) Ltd 1990(2) SA

⁶ 1993(1) SA 245 at page 246 to 247.

"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."

20. 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. 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. Section 138 of the Act, read with Section 86(8)(a), provides that if a debt counsellor makes a recommendation in terms of section 86(7)(b), and the consumer and each credit provider concerned accept the proposal, the debt counsellor must record the proposal in the form of an order, and if it is consented to by the consumer and each credit provider concerned, file it as a consent order in terms of Section 138 of the Act. On this basis the Tribunal then confirms such a debt re-arrangement as an Order of the Tribunal.
23. It is evident from the initial application filed with the Tribunal to confirm the debt re-arrangement, and the submissions made by the Applicant that there was signed acceptance from the Respondent. The draft consent order was also signed by the Applicant, consenting to the Standard Bank Home Loan Account being part of the debt re-arrangement process. The order was therefore not erroneously sought or granted.
24. The Applicant has furthermore, measured against Section 165 of the Act, not submitted any reasons to show that there was an ambiguity in the Tribunal order, or that the Tribunal had to correct an obvious error or omission or that there was a mistake common to the parties.
25. In the present matter, the Tribunal therefore has to consider whether it can rescind or vary an order of the Tribunal due to a change in circumstances of one of the parties.
26. The provisions of Section 165 are similar to the provisions of Rule 42 of the High Court, allowing for the rescission or variation of a judgment. Rule 42 provides as follows:

“(1) The court may, in addition to any powers it may have mero motu or upon application of any party affected, rescind or vary:

- (a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;*
- (b) An order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;*
- (c) An order or judgment granted as the result of a mistake common to the parties.*

(2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may have been affected by any variation sought.

(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.”

27. Further provision is made for the rescission or variation of an order in terms of Rule 43 of the High Court. This rule provides specifically for the following orders:

- (a) maintenance;
- (b) a contribution towards the costs of a pending matrimonial action;
- (c) interim custody of any child;
- (d) interim access to any child.

28. Rule 43(6) provides specifically for the rescission of orders relating to the 4 matters specified above. Rule 43(6) provides as follows:

"The court may, on the same procedure, vary its decision in the event of a material change taking place in the circumstances of either party or a child, or the contribution towards costs proving inadequate."

29. It is submitted that this makes specific provision for variation of an order, only in the specific matters listed above, on the grounds of a change in circumstances. The general rule on rescission and variation of orders in the High Court, namely Rule 42, still only provides for the same circumstances as Section 165 provides for, and does not provide for variation of orders in matters on the grounds of a change in circumstances. This is strictly reserved for maintenance matters as is set out in Rule 43.

30. In the matter of *Hancke v Hancke*⁷ the South Eastern Cape Local Division considered the application of these two rules. The matter related to an application for the variation of an existing maintenance order. The court considered the application of Rule 42 and 43 and held as follows:

"As I understand the applicant's case, he does not rely on any material change in his or in the respondent's material or financial positions. What he says is that he now for the first time has available to him certain financial papers of account which were not available to him when the previous applications were heard. To my mind this does not constitute a change in circumstances, but relates to the determination of those circumstances. It follows that the application cannot on such basis be brought in terms of Rule 43(6). Applicant must find his remedy elsewhere."

In such regard one turns to rule 42(1) which allows for variation or rescission of court orders. Put briefly, it relates to orders erroneously granted in the absence of a party affected thereby. Quite clearly this provision is not applicable in the present matter. The applicant therefore has to fall back on his common law remedy. It has been held (I think it is De Wet's case in the then Appellate Division) that while variation of judgments usually requires action procedure, it may in suitable circumstances be done on ordinary application. Clearly, this will be where there is no serious dispute on the facts, that being one of the considerations for such procedure..."

31. What is evident from the above judgment is that the application of Rule 43(6) is strictly reserved to applications for variation of orders based on a change in circumstances in the following matters:

- (a) maintenance;
- (b) a contribution towards the costs of a pending matrimonial action;
- (c) interim custody of any child;
- (d) interim access to any child.

⁷ 2000 JDR 0631 (SE)

32. In any other application for rescission or variation the High Court has to apply Rule 42(1) and can only grant such orders on the basis set out therein, which does not include a change in circumstances. It is specifically in maintenance matters that Rule 43(6) provides for a further alternative ground for variation, namely a change in circumstances.
33. It is evident from the above that the requirements stipulated in Section 165 of the Act finds no application to the request by the Applicant and consequently the order of the Tribunal cannot be varied or rescinded on the grounds as stated.
34. The Act further does not provide for the variation of a Tribunal order in instances wherein the circumstances of the consumer changes. Thus, the Applicant has failed to establish grounds for variation or rescission of the order of the Tribunal.

ORDER

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

35.1 The application to vary or rescind the order granted on 06 November 2012 is hereby dismissed.

35.2 No order as to costs

DATED ON THIS 11th day of December 2013

Mrs H Devraj
Tribunal Member

Ms D Terblanche and Adv J Simpson concurring

Authorised for issue by the National Consumer Tribunal
Case number NCT/9176/2013/165(1)(P)NCA
Date 2014/01/07
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