IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case Number: **NCT/11206/2013/165(1)(P)NCA**

In the matter between:

ANTHONY KENNETH CHARLES	**1ST APPLICANT**
GILLIAN RANE CHARLES	**2ND APPLICANT**

and

ABSA BANK LIMITED	**1ST RESPONDENT**
DIRECT AXIS (SA) PTY LIMITED	**2ND RESPONDENT**
STANDARD BANK OF SOUTH AFRICA LIMITED	**3RD RESPONDENT**
MERCEDES BENZ FINANCIAL SERVICES (PTY)LTD	**4TH RESPONDENT**
WOOLWORTHS (PTY) LTD	**5TH RESPONDENT**

Coram:

Ms H Devraj	–	Presiding member
Adv J Simpson	–	Member
Ms Penelope Beck	–	Member

Date of hearing – 15 April 2014

JUDGMENT AND REASONS

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[1] Application in terms of section 165(1) of the National Credit Act for variation of a refusal of a Debt Re-arrangement Order applied for in terms of section 86(8).

[2] Where the Applicants incorrectly claimed that the order/decision contains an ambiguity, obvious error or omission.

[3] Where the refusal of an application will be subject to res judicata principle, insofar as the subject matter, parties and relief are the same.

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[4] Where an application for a debt re-arrangement order has been refused, due to specifically identified legislative or other material requirements not met, the Tribunal allows for the possibility that the application can be resubmitted as an entirely new application once the errors are rectified.
[5] Application dismissed - No order as to costs.

APPLICANT

1. The Applicants in this matter are Anthony Kenneth Charles and Gillian Rane Charles residing in Parklands, Cape Town (hereinafter referred to as "the Applicants").

2. At the hearing of the matter the Applicants were represented by a Debt Counsellor, Mr Ashley Franklin Abrahams. The Debt Counsellor appeared before the Tribunal via skype.

RESPONDENT

3. The Respondents are ABSA Bank Limited, Direct Axis (SA) Pty Limited, Standard Bank of South Africa Limited, Mercedes Benz Financial Services(Pty) Limited and Woolworths (Pty) Limited, registered credit providers with the National Credit Regulator (hereinafter referred to as "the Respondents").

4. There was no appearance by any of the Respondents or a representative on their behalf at the hearing.

5. The Respondents were duly served with the application.

APPLICATION TYPE

6. The Applicants brought an application in terms of Section 165(1) of the National Credit Act[1] to the Tribunal to vary a refusal to confirm a debt re-arrangement agreement. This refusal was handed down by the Tribunal on 21 September 2013.

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

BACKGROUND

7. During July 2013, the Applicants, through a registered debt counsellor, Ashley Franklin Abrahams, 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/9763/2013/138(1)(P). Presiding member, Professor Joseph M Maseko, refused to confirm the debt re-arrangement agreement as an order of the Tribunal on 21 September 2013, and provided reasons therefore. The reason for declining to confirm the debt re-arrangement agreement as an order of the Tribunal was based on the draft consent order not being attached, as required by section 86(8) of the Act.

8. During October 2013, the Applicants, through the same debt counsellor, brought an application in terms of Section 165(1) of the Act to vary the refusal of the debt re-arrangement agreement handed down by the Tribunal on 21 September 2013.

APPLICABLE SECTIONS OF THE ACT

9. Section 138 of the Act, read with Section 86(8)(a) of the Act, provides that if a debt counsellor makes a recommendation in terms of section 86(7)(b), and the consumer and each credit provider concerned accepts 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.

10. According to Table 2 of the Regulations[2], one of the filing requirements for a Section 138 application is "a signed copy of the agreement reached between the parties to the dispute resolution, formulated as an order of the Tribunal".

11. The initial Application[3] in July 2013 was filed as a consent order application in terms of Section 138(1) of the Act, which provides:

> ***"Consent orders***
>
> *138. (1) If a matter has been-*
>
> *(a) resolved through the ombud with jurisdiction, consumer court; or alternatively*

[2] National Credit Regulations, published in Government Notice R489 of 31 May 2006 (GG 268864).
[3] NCT/9763/2013/138(1)(P).

(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."

12. The application currently before the Tribunal is 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

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

THE HEARING

13. The matter was heard on 15 April 2014 in Centurion.

APPLICANT'S SUBMISSION

14. The basis of the Applicants' Application, as contained in the application form, can be summarised as follows:

14.1 The Applicants stated that the order/decision contains an ambiguity, obvious error or omission, being that the Applicants filed a draft consent order with the Tribunal, but the order went missing.

THE HEARING

15. The Applicants' representative at the hearing, made the following submissions:-

15.1 The application that was filed with the Tribunal was initially incomplete and the Registrar had requested that the Applicants cite Woolworths correctly and also provide the signed acceptance letters relating to the credit providers Standard Bank and Mercedes Benz Financial Services.

15.2 Once these documents were submitted to the Tribunal the parties received a Notice of Complete Filing from the Registrar on 06 August 2013.

15.3 The Registrar did not request a copy of the draft consent order and therefore the order must have been part of the papers that was filed with the Tribunal.

15.4 The draft consent order was on pages 30 and 31 of the Applicants' record on the full application that was filed with the Tribunal.

16. The Tribunal requested Mr Abrahams to provide evidence that he had actually filed the full application including the draft consent order as the case record of the Tribunal (case file NCT/9753/2013/138(1) did not contain the draft consent order.

17. Mr Abrahams was directed to resend the e-mail of 15 July 2013, in order to determine whether the complete application, including the draft consent order was actually filed with the Tribunal. He was directed to file these papers by the end of business on 15 April 2014.

18. On 15 April 2013, Mr Abrahams forwarded the initial application that was filed on 15 July 2013 to the Tribunal. Mr Abrahams also submitted an apology to the Tribunal, as he then realised that due to a scanning error, the draft consent order was not filed with the Tribunal on 15 July 2013. Pages 30 and 31 therefore did not form part of the application that was filed with the Tribunal.

CONSIDERATION OF THE EVIDENCE ON A DEFAULT BASIS

19. On 09 October 2013, the Applicants filed the application in terms of section 165 of the Act with the Tribunal. Subsequently a Notice of Complete Filing was issued by the Registrar to both the Applicants and the Respondents on 17 January 2014.

20. The notice stated that the Respondents had to respond within 15 days by serving an answering affidavit on the Applicants. The Respondents however failed to do so.

21. The Applicants subsequently filed an application for a default order in terms of Rule 25(2) of the Rules of the Tribunal[4], dated 22 November 2013.

22. 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"*

23. 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 THE LAW

24. 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:

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

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

24.3 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:

25. <u>Erroneously sought or granted</u>

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.[5] The court considered the

[4] For the Conduct of Matters before the National Consumer Tribunal published under GN789 in GG30225 of 28 August 2007 as amended by GenN428 in GG34405 OF 29 June 2011 (hereinafter "the Rules of the Tribunal").
[5] Bakoven Ltd v G J Howes (Ptv) Ltd 1990(2) SA 446 at page 469 B.

meaning of the words *"erroneously granted"*. This is dealt with in the *Bakoven*-case[6] 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. In the matter of *First National Bank of SA Bpk v Jurgens and Another,*[7] 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*

[6] Bakoven Ltd v G J Howes (Ptv) Ltd 1990(2) SA.
[7] 1993(1) SA 245 at page 246 to 247.

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."

26. 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.

27. 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.

28. The principle of *res judicata* also needs to be considered.

In *AB Charter Motor Holdings CC v Fairweather*[8] *res judicata* is explained as follows:

"... that a prior final judgement had been given in proceedings involving (a) the same subject matter, (b) based on the same res or thing, (c) between the same parties, or, put in another way, if the cause of action has been finally litigated in the past by the parties, a later attempt by one of them to proceed against the other on the same cause, for the same relief, can be met by the exception res judicata.

It is evident from the above that once a final decision has been given, whether it is a refusal or a different order, it is final and conclusive. In such an instance the Tribunal has finally performed all its statutory functions or duties in relation to a particular application, has exhausted its powers and has discharged its mandate in relation to that application. A refusal of an application will

[8] (J1894/99) [2000] ZALC 101 (15 September 2000).

therefore be subject to *res judicata* principle, insofar as the subject matter, parties and relief are the same.

In the event that the subject matter of a new application is different from the previous application refused, *res judicata* will not find application. A different subject matter could constitute a different acceptance letter, a signed acceptance letter, a different interest rate, a required document, etc.

CONSIDERATION OF THE EVIDENCE AND FINDINGS

29. The evidence before the Tribunal, as admitted by Mr Abrahams, is that he did not file the draft consent order. Under these circumstances the application was in fact not complete and a notice should have been issued by the Registrar calling on the Applicants to file the required draft consent order before the application could be regarded as complete.

30. The Tribunal member, on 21 September 2013, therefore correctly refused the application, on the basis that there was no draft consent order filed. In applying the requirements of Section 165 (1) of the Act to these facts it is evident that there was no ambiguity, obvious error or omission when the order was refused. It also cannot be said that the order was erroneously sought or granted. Finally there is no basis for a finding that a mistake common to all the parties was made.

31. 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 on the grounds as stated.

32. Even though Section 165 does not find any application to the facts before the Tribunal, consideration must be given to circumstances where the application to have a debt re-arrangement made an order of the Tribunal is refused due to errors or omissions in the application. The question must be asked whether it was the intention of the legislature that a refusal, based on an error in the application, is final and that the consumer seeking assistance is forever barred from applying for a debt re-arrangement to be made an order of the Tribunal. A simple reading of the Act indicates that it would be contrary to the spirit and intention of the Act to render a consumer helpless under these specific circumstances.

33. The principle of *res judicata* is applied to ensure that there is finality to proceedings before a court or Tribunal and to allow for an orderly appeal or review process. It can safely be argued that in the specific circumstances, where an application for a debt re-arrangement to be made an order of the Tribunal has been refused, due to specifically identified legislative or other material requirements not met, the Tribunal is allowing for the possibility that the application can be resubmitted as an entirely new application once the errors are rectified.

Furthermore, in refusing the order, the Tribunal Member stated that the application was dismissed in its current form (emphasis of Tribunal Member). As part of the refusal order, the Presiding member therefore allowed for the possibility of the application being resubmitted as a new application once the error or omission in question was corrected.

ORDER

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

34.1 The application to vary the refusal of 21 September 2013, is hereby dismissed.

34.2 No order as to costs.

DATED ON THIS 20TH DAY OF MAY 2014

[signed]
Mrs H Devraj
Presiding Member

Adv J Simpson (Member) and Ms PA Beck (Member) concurring.