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IN THE NATIONAL CONSUMER TRIBUNAL
HELD AT CENTURION

Case number: NCT/26808/2015/165

In the matter between:

FRSTRAND BANK LTD

APPLICANT

and

ROY EDWIN DAVIDS

FIRST RESPONDENT

LOLITA DAVIDS

SECOND RESPONDENT

BLUE BEAN

THIRD RESPONDENT

EDCON

FOURTH RESPONDENT

FOSCHINI

FIFTH RESPONDENT

HENRI SCHULTZ

SIXTH RESPONDENT

Coram:

Mr X May - Presiding member

Ms L Best - Member

Mr F Sibanda - Member

Date of Hearing - 25 February 2016

JUDGMENT AND REASONS

THE PARTIES

1. The Applicant is FirstRand Bank Ltd, a credit provider registered in terms of the National Credit Act, No 34 of 2005 ("the NCA") (hereinafter referred to as "the Applicant").
2. The first Respondent is Roy Edwin Davids, and the second Respondent is Lolita Davids, consumers who jointly applied for a debt re-arrangement agreement to be made an order of the Tribunal in terms of section 138 of the NCA (hereinafter referred to as "the Respondents").
3. The third to fifth Respondents are credit providers registered with the National Credit Regulator. The sixth Respondent is a Debt Counsellor registered with the National Credit Regulator.

JURISDICTION

4. The Applicant lodged an application with the Tribunal for the rescinding of an order granted by a single member of the Tribunal in accordance with section 138(1) of the NCA.
5. The application is brought in terms of section 165 of the NCA.
6. The Tribunal has jurisdiction to hear this

matter. ISSUES TO BE DECIDED

7. The Tribunal must determine whether there are grounds to rescind the order granted.

BACKGROUND

8. In July 2009 the Respondents applied, through debt counsellor Hendri Schultz, for debt review.
9. Various proposals and counter-proposals were exchanged between the Applicant and the Debt Counsellor.
10. In March 2010 the Applicant terminated the Respondent's home loan account due to the latter being in default after the lapse of 60 business days.
11. The Debt Counsellor launched an application for debt review in Bellville Magistrate's Court. The matter was struck off the roll due to non-appearance by the Debt Counsellor, but was later re-instated.
12. In October 2011 the Applicant received and accepted a revised proposal with cascade payments.
13. On 23 October 2012 Tribunal Presiding Member, Ms Y Carrim confirmed the debt rearrangement as an order of the Tribunal.
14. In July 2015 the Applicant applied to the Tribunal to have the order rescinded.

THE HEARING

15. The matter was heard on 25 February 2016.
16. At the hearing the Applicant was represented by Ms Gwen Mynhardt.
17. There was no appearance by any of the Respondents or their representative at the hearing.

18. Ms Mynhardt explained to the Tribunal that the reason for bringing the application for rescission of the order is because the debt review in respect of the FNB home account No [3.....] is not per the agreed acceptance and will not result in the eventual satisfaction of the debt because it does not contain the cascade payment plan.
19. As such the Applicant relies on section 65(a) and (c) to request that the order be rescinded.
20. According to the Applicant, the granted order was erroneously sought by the Debt Counsellor as it did not represent the true settlement agreement reached between the parties in line with the Applicant's letter of acceptance, dated 17 October 2011.
21. The Applicant further contends that the order granted is as a result of a mistake common to all the parties to the proceedings in that the order will not result in the eventual satisfaction of the debt.
22. Moreover, the Respondents have indicated their desire to withdraw from debt review.

APPLICABLE LAW

23. Section 165 of the NCA 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".*

CONSIDERATION OF THE FACTS AND THE LAW

24. Section 165 of the NCA lays down specific circumstances under which an order may be varied or rescinded, and these are instances where:

- (a) an order was 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) an order was made or granted as a result of a mistake common to all the parties to the proceedings

25. Section 165(a) of the NCA does not find application in the case at hand since applications for debt-rearrangement are adjudicated on papers submitted. Parties are not required to be physically present when a member adjudicates.

26. The Tribunal had to turn to section 165(c).

27. The letter of acceptance from the Applicant dated 17 October 2011, 'Annexure KE4' states as follows:

"We hereby accept your proposal to repay the outstanding debt obligation as follows:

- *A monthly instalment of R3,326.50, plus cascading payments*
- *On an outstanding balance of R460,036.73*
- *At an interest rate of 7.75% until the debt is settled in full."*

28. The Proposal Schedule Summary from the Debt Counsellor, 'Annexure KE3' contains proposed restructured amounts from various credit providers including the Respondent's account with the Applicant. This summary contains a table with cascading amounts for the FNB home loan account No [3.....].

29. It is not clear why the cascading amounts were omitted by the Debt Counsellor in the draft order sent to the Tribunal.
30. In the circumstances and in the absence of any other explanation the Tribunal can only surmise that this was a mistake on the part of the Debt Counsellor.
31. Although the letter of acceptance from the Applicant states that the restructured instalment is accepted plus the cascading payments the Presiding Member took into account what was presented by the Debt Counsellor.
32. The Applicant has indicated that the Respondents wish to withdraw from debt review.
33. However, the Tribunal will not take this into account in reaching a decision on this matter, due to the fact that according to section 71(1) of the NCA a consumer can withdraw from debt review after applying and receiving a clearance certificate from the debt counsellor.
34. Moreover, in terms of section 160(1) of the NCA failure to comply with an order of the Tribunal is an offence.

CONCLUSION

35. The Applicant's letter of acceptance stated that the restructured amounts are accepted inclusive of the cascading repayment plan.
36. The cascading amounts were not included by the Debt Counsellor in its application to the Tribunal and consequently were not part of the order granted by the Tribunal.
37. This appears to have been a mistake on the part of the Debt Counsellor.

ORDER

38. Under the circumstances and for the reasons stated above, the Tribunal orders as follows:

- a. the application to rescind an order granted by the Tribunal is granted.

DATED THIS 7th DAY OF MARCH 2016

[Signed]

FK Sibanda
Member

Authorised for issue by National Consumer Tribunal

Case Number: NCT/26808/2015/165

Date: 2016/ 03/ 31
CCYY / MM / DD

Mr X May (Presiding Member) and Ms L

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