IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: NCT/79160/2017/165

In the matter between:

ABSA BANK LIMITED	**APPLICANT**
and	
BEN SAGER (NCRDC: 2484)	**1st RESPONDENT**
NONHLANHLA CORAH NXELE	**2nd RESPONDENT**
SIFISO LUCKY MTHETHWA	**3rd RESPONDENT**
CAPITEC BANK LIMITED	**4th RESPONDENT**
DIRECT AXIS (SA) (PTY) LTD, AGENT FOR CALL DIRECT ON BEHALF OF FIRSTRAND BANK LIMITED	**5th RESPONDENT**
DIRECT AXIS (SA) (PTY) LTD, ON BEHALF OF FIRSTRAND BANK LIMITED	**6th RESPONDENT**
EDGARS, ON BEHALF OF EDCON (PTY) LTD	**7th RESPONDENT**
FINCHOICE (PTY) LTD	**8th RESPONDENT**
FIRST NATIONAL BANK, A DIVISON OF FIRSTRAND BANK LIMITED	**9th RESPONDENT**
FOSCHINI RETAIL GROUP (PTY) LTD	**10th RESPONDENT**
THE MOTOR FINANCE CORPORATION (MFC), A DIVISION OF NEDBANK LIMITED	**11th RESPONDENT**
NEDBANK LIMITED	**12th RESPONDENT**
SOUTHERN VIEW FINANCE UK LIMITED T/A CAPFIN	**13th RESPONDENT**
TRUWORTHS LIMITED	**14th RESPONDENT**
WOOLWORTHS (PTY) LTD	**15th RESPONDENT**

Coram:

Adv J Simpson	-	Presiding Member
Ms. P Beck	-	Member
Mr. A Potwana	-	Member

Date of Hearing – 15 August 2017

JUDGMENT AND REASONS

APPLICANT

1. The Applicant in this matter is ABSA Bank Limited, a registered credit provider (hereinafter referred to as the "Applicant").

2. At the hearing the Applicant was represented by Mr B Van Der Merwe of Hammond Pole Attorneys.

RESPONDENTS

3. The 1st Respondent is the debt counsellor for the 2nd and 3rd Respondents. The 2nd and 3rd Respondents are the consumers who are under debt review. The 4th to 15th Respondents are all registered credit providers (hereinafter collectively referred to as "the Respondents").

4. There was no appearance by any of the Respondents or any representatives on their behalf 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 (or alternatively rescind) the debt re-arrangement agreement, which was made an order of the Tribunal on 5 July 2016 under case number NCT/43218/2016/138.

CONSIDERATION OF THE EVIDENCE ON A DEFAULT BASIS

6. On 5 April 2017, the Applicant filed the Section 165 application with the Tribunal. The Application was served on the 2nd and 3rd Respondents by registered post and by e-mail to the remainder of the Respondents on 29 May 2017. The Registrar issued a notice of complete filing to the parties on 7 June 2017. A notice of set down was issued to all the parties on 14 July 2017.

7. In terms of Rule 13 of the Rules of the Tribunal[2], the Respondents had to respond within 15 business days by serving an answering affidavit on the Applicant. The Respondents however failed to do so.

[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.

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.

10. 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"*

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 2016, the debt counsellor, 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 5 July 2016 under case number NCT/43218/2016/138.

14. The Applicant submits that the order by the Tribunal contains three accounts relating to ABSA, namely, a home loan account and two credit card accounts. The order states that the interest rate which shall be applied to the home loan account will be 0% and the rate on the two credit account accounts will be 0.01%. The Applicant submits that it accepted the debt counsellor's proposal for these rates due to an internal error. It never intended to accept these interest rates.

15. The Applicant approached the debt counsellor in October 2016 requesting him to agree to an increase in the interest rate to 9% on all three the accounts. The debt counsellor did not respond to the request and the Applicant then approached the Tribunal with this application for variation or alternatively a rescission of the order.

16. The Applicant submits that the Applicant is being prejudiced by the fact that the loan will not be settled, due the ever increasing interest that is accumulating on the account. It therefore appears to the Tribunal

that the Applicant is refusing to adhere to the order of the Tribunal in relation to the interest rates of 0% and 0.01% and is applying its own contractual interest rates to the loan accounts.

17. The Applicant further submitted that the order made by the Tribunal was null and void. This is due to the decision of the high court in the matter of *Nedbank Limited v LR Jones 24343/2015,* which found that a court does not enjoy any jurisdiction to reduce the contractual interest rates applicable to a loan under debt review.

18. During the hearing Mr Van Der Merwe submitted that he had done a calculation and the instalments reflected on the order for the home loan account will not satisfy the outstanding balance. Mr Van Der Merwe confirmed that he had not made any such submission on the pleadings and it was merely something he had discovered while perusing the file. He conceded that his submissions could not be regarded as evidence in the matter.

19. Mr Van Der Merwe then requested a postponement of the matter to enable him to prepare a supplementary affidavit and produce the necessary evidence to support his contention regarding the calculation.

20. The Tribunal postponed the matter *sine die* and allowed the Applicant to submit a supplementary affidavit by 5 September 2017.

21. By 5 September 2017 no filing had been received from the Applicant. On 15 September 2017 the Tribunal Registrar received an e-mail from the Applicant referring to a query that had been done on the home loan account on 6 September 2017. The attached e-mail from ABSA Bank merely appears to submit that the balance on the home loan was increasing as the monthly amount being paid by the consumer was less than the monthly interest due on the account. No supplementary affidavit or evidence relating to the calculation on the order was received.

APPLICABLE SECTIONS OF THE ACT

22. 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

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

23. The original Application was 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."

CONSIDERATION OF SECTION 165 OF THE ACT

24. 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:

- When the order of the Tribunal had been erroneously sought or granted in the absence of a party affected by it;
- There is ambiguity, or an obvious error or omission, but only to the extent of correcting that ambiguity, error or omission; or
- 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.[3] The court considered the meaning of the words *"erroneously granted"*. This is dealt with in the *Bakoven*-case[4] where it was stated:

[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.

"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,*[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."

26. <u>Ambiguity, or an obvious error or omission, but only to the extent of correcting that ambiguity, error or omission</u>

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

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

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.

Consideration of the evidence

28. The debt review proposal which the debt counsellor sent to the credit providers is attached to the original application for the debt review order. The proposal clearly shows that the debt counsellor proposed the interest rate of 0% on the home loan and 0.01% on the two credit card accounts. It can be further noted that the interest rate proposal made on all 23 of the loans, to the various credit providers, are all generally low. Most of the interest rates are for 0% or 0.01% percent. There are only three loans which propose interest rates of 0.34%, 9.3% and 12.75%.

29. The letters which the Applicant sent in reply to this proposal clearly state that it accepts the proposal made and confirms the interest rates of 0% and 0.01% applicable to the loans. The letters set out the monthly instalments in detail and reflect the interest rates applicable.

30. The proposal was made by the debt counsellor and expressly accepted by the Applicant. It is this proposal and acceptance that was made an order of the Tribunal by express consent and agreement of the parties as required by section 86(8) of the NCA. There is no evidence to show that any error, omission or mistake was made by the parties relating to the application for the debt review order.

31. The Applicant made a very brief reference to the *Jones* judgment in its papers and did not make any further argument at the hearing of the matter. In the matter of *Nedbank Limited v Jones and 14 others 24343/2015* the court held that –

> *A re-arrangement proposal in terms of section 86(7)(c) of the National Credit Act that contemplates a monthly instalment which is less than the monthly interest which accrues on the outstanding balance does not meet the purposes of the National Credit Act. A re-arrangement order incorporating such a proposal is ultra vires the National Credit Act and the magistrate's court has no jurisdiction to grant such an order.*

32. It is important to note that the judgment refers very specifically to a proposal made in terms of section 86(7)(c) of the NCA. This form of proposal and eventual application to the Magistrates court can result in the Magistrate granting an order for a reduction in interest rates, which is essentially forced upon the credit providers without their consent.

33. The process followed in obtaining an order from the Tribunal is however materially different. The relevant sections are as follows –

> *(7) If, as a result of an assessment conducted in terms of subsection (6), a debt counsellor reasonably concludes that—*
>
> *(a) .....*
>
> *(b) the consumer is not overindebted, but is nevertheless experiencing, or likely to experience, difficulty satisfying all the consumer's obligations under credit agreements in a timely manner, the debt counsellor may recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt rearrangement;*
>
> *(8) If a debt counsellor makes a recommendation in terms of subsection (7) (b) and—*
>
> *(a) the consumer and each credit provider concerned accept that 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; or*
>
> *(b) if paragraph (a) does not apply, the debt counsellor must refer the matter to the Magistrate's Court with the recommendation.*

34. The debt counsellor therefore makes a proposal to all the credit providers, which is then formally agreed to by all of them. It is this agreement which is captured in a draft consent order and then confirmed by the Tribunal as an order of the Tribunal in accordance with section 86(8) of the NCA. The parties to such a proposal are therefore free to reject the proposal made. The order of the Tribunal will only be granted if all the credit providers agree to the proposal. It can therefore never be forced upon them. It could never have been the intention of the legislature that the parties be forced to abide by the contractual terms and could not agree and consent to a reduction of interest rates, or even a reduction in the outstanding balance, in the interests of settling the consumer's debts. That the parties can agree to reduced interest rates and other terms of the agreement fully meets the requirements and objectives of the NCA in relation to the debt review process (in as far as section 86(8) is concerned).

35. In the Tribunal's view the *Jones* judgment is not applicable to the order made by the Tribunal. The Tribunal's order is therefore not *ultra vires*.

36. The Applicant submitted that the repayments on the home loan as reflected on the order will not satisfy the outstanding balance. The Applicant did not present any evidence in this regard in its papers and failed to provide the necessary evidence when granted the opportunity to do so. The cryptic information provided on 15 September 2017 (long after the 5 September 2017 deadline) did not assist the Applicant's submissions in this regard whatsoever.

37. The Applicant has not placed any evidence before the Tribunal of any mistake, error or omission which may have occurred. There is no basis on which the provisions of section 165 could be applied to this matter.

38. The Tribunal wishes to clearly note for the Applicant's attention that the order of the Tribunal is binding. The Applicant must abide by the terms of the order made and may not apply its own interest rate to the loans in defiance of the order made.

ORDER

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

    39.1 The application to vary the order is refused.

    39.2 No order as to costs.

Thus done and signed at Centurion on 21 September 2017.

Authorised for issue by National Consumer Tribunal

Case Number: NCT/79160/2017/165

Date: 27 September 2017

{signed}

Adv. J Simpson

Presiding Member

National Consumer Tribunal
Ground Floor, Building B
Lakefield Office Park
272 West Avenue, Centurion, 0157
www.thenct.co.za

national consumer tribunal

Ms. P. Beck (Member) and Mr. A Potwana (Member) concurring.