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IN THE NATIONAL CONSUMER TRIBUNAL
HELD IN CENTURION

Case Number: NCT/75782/2017/165(1)NCA

In the matter between:

IAN WASON
NCRDC 1817

APPLICANT

And

ADRIAAN PIETER WILLEM NELL
[8...]

CONSUMER

And

ABSA LTD
FIRST NATIONAL BANK, A DIVISION OF FIRST RAND
BANK LIMITED
NEDBANK LTD
WESBANK, A DIVISION OF FIRST RAND BANK LTD

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT

Coram:

Adv. J Simpson – Presiding member
Prof. B Dumisa – Member
Mrs. H. Devraj – Member

Date of hearing – 04 May 2017

JUDGMENT AND REASONS

APPLICANT

1. The Applicant in this matter is Ian Wason a registered debt counsellor (hereinafter referred to as the "Applicant"). The Consumer is Adriaan Nell, an adult male.
2. At the hearing of the matter the Applicant was represented by Ms Faeda Charles from a debt counselling firm called Debt Busters.

RESPONDENTS

3. The Respondents are all registered credit providers (hereinafter referred to as "the Respondents").
4. There was no appearance by the Respondents or any representative at the hearing.

APPLICATION TYPE

5. The Applicant brought an application in terms of Section 165(1) of the National Credit Act¹ to the Tribunal to rescind the debt re-arrangement agreement, which was made an order of the Tribunal on 23 December 2016 under case number NCT/49141/2016.

CONSIDERATION OF THE EVIDENCE ON A DEFAULT BASIS

6. During February 2017 the Applicant filed the Section 165 application with the Tribunal. The Registrar issued a Notice of Complete Filing to the parties on 24 February 2017.
7. In terms of Rule 13 of the Rules of the Tribunal², the Respondents had to respond within 15 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. The Notice of set down was issued on 10 April 2017.
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 further satisfied that the application was properly served on the Respondent. The matter therefore proceeded on a default basis.

BACKGROUND

13. During May 2016, the debt counsellor 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 23 December 2016.
14. The Applicant had however already sent a notice of withdrawal of the application to the Registrar on 8 July 2016. The notice and proof of submission was provided to the Tribunal.

APPLICABLE SECTIONS OF THE ACT

15. 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”.*

16. The original Application³ 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

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:

- 17.1 When the order of the Tribunal had been erroneously sought or granted in the absence of a party affected by it;
- 17.2 There is ambiguity, or an obvious error or omission, but only to the extent of correcting that ambiguity, error or omission; or
- 17.3 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:

18. Erroneously sought or granted

³ NCT/10065/2013/138(1)(P).

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*-case⁵ 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:

"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

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

⁵ *Bakoven Ltd v G J Howes (Pty) Ltd* 1990(2) SA.

⁶ 1993(1) SA 245 at page 246 to 247.

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. The evidence is clear that the application for the consent order had already been withdrawn before the order was granted. Under the circumstances the order was therefore granted erroneously. Although it must be noted that the Tribunal member that granted the order was not made aware of the withdrawal of the application by the Registrar.

22. The order can therefore be rescinded as per section 165 of the Act as an order that has been erroneously granted in the absence of a party affected by it;

ORDER

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

23.1 The application to rescind the order is granted. The debt re-arrangement order granted on 23 December 2016 under case number NCT/49141/2016 is hereby rescinded.

23.2 No order as to costs.

Thus done and signed at Centurion this 12th day of May 2017.

{signed}

Adv. J. Simpson

Member

Prof. B Dumisa (Member) and Ms. H Devraj (Member) concurring.