

IN THE NATIONAL CONSUMER TRIBUNAL  
HELD IN CENTURION

Case number: NCT/109813/2018/165

In the matter between:

LAUREN DONALD

APPLICANT

and

BENAY SAGER

1<sup>ST</sup> RESPONDENT

ABSA BANK LIMITED

2<sup>ND</sup> RESPONDENT

THE FOSCHINI RETAIL GROUP (PTY) LTD

3<sup>RD</sup> RESPONDENT

GETBUCKS (PTY) LTD

4<sup>TH</sup> RESPONDENT

NEDBANK LIMITED

5<sup>TH</sup> RESPONDENT

WOOLWORTHS (PTY) LIMITED

6<sup>TH</sup> RESPONDENT

Coram:

Ms H Devraj	-	Presiding Tribunal Member
Mr. A Potwana	-	Tribunal Member
Adv. J Simpson	-	Tribunal Member

Date of Hearing	-	29 August 2018
Date of Judgment	-	6 September 2018

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JUDGMENT AND REASONS

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APPLICANT

1. The Applicant in this matter is Lauren Donald, a consumer under debt review, (hereinafter referred to as the "Applicant").

At the hearing of the matter the Applicant was represented by an attorney, Leanda van Deventer of Esterhuyze Incorporated.

## RESPONDENTS

3. The 1<sup>st</sup> Respondent is a registered Debt Counsellor. The 2<sup>nd</sup> to the 6<sup>th</sup> Respondents are all registered with the National Credit Regulator as credit providers in terms of the National Credit Act<sup>1</sup> (hereinafter collectively referred to as "the Respondents").
4. There was no appearance by any of the Respondents or their representatives at the hearing.

## APPLICATION TYPE

5. This is an application in terms of Section 165 of the National Credit Act (hereinafter referred to as "the Act") to rescind the debt re-arrangement agreement; which was made an order of the Tribunal on 16 November 2017 under case number NCT/85609/2017/138.

## CONSIDERATION OF THE EVIDENCE ON A DEFAULT BASIS

6. On 27 June 2018 the Applicant filed the application with the Tribunal. The application was served on the Debt counsellor and the Respondents via registered mail. On 29 June 2018 the Tribunal's Registrar issued a notice of filing to all the parties.
7. In terms of Rule 13 of the Rules of the Tribunal,<sup>2</sup> the Respondents had 15 business days to serve an answering affidavit and file the same with the Tribunal's Registrar. The Respondents however failed to do so.
8. The Applicant did not file an application for a default order in terms of Rule 25(2).
9. On 2 August 2018 the Tribunal's Registrar issued a notice of set down to all the parties setting the matter down for hearing on a default basis due to the pleadings being closed.

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<sup>1</sup> Act 34 of 2005 (hereinafter referred to "the Act")

<sup>2</sup> 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.

10. On the date of the hearing the Presiding Tribunal member was satisfied that the notice of set down was adequately served on the Respondents and the matter proceeded on a default basis.

11. Rule 13(5) provides that:

*"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"*

12. 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.

## **BACKGROUND**

13. The Debt Counsellor, Benay Sager, applied for an order confirming the debt restructuring agreement between the Consumer and the Respondents as an order of the Tribunal. The order was granted by the Tribunal on 16 November 2017 under Tribunal case number NCT/85609/2017/138.

14. The Applicant has applied to have the order rescinded. The Applicant submitted that she was married in community of property at the time the order was granted. Her husband was however not cited as a party nor was he included in the debt review process.

## **APPLICABLE SECTIONS OF THE ACT**

15. The application is brought in terms of Section 165(b) of the Act, which states -

*"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 consent order was made in terms of Section 138(1) of the Act, which provides that;

*"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 *"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:

18. 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.<sup>3</sup> The court considered the meaning of the words "erroneously granted". This is dealt with in the *Bakoven*-case<sup>4</sup> 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*,<sup>5</sup> 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*

<sup>3</sup> *Bakoven Ltd v G J Howes (Pty) Ltd* 1990(2) SA 446 at page 469 B

<sup>4</sup> *Bakoven Ltd v G J Howes (Pty) Ltd* 1990(2) SA.

<sup>5</sup> 1993(1) SA 245 at page 246 to 247.

*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."*

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 before the Tribunal is that the Applicant is married in community of property, profit and loss. It is trite that parties to a marriage in community of property share a joint estate and are jointly and severally liable for the debts of the common estate. Consequently; any debt review process must be entered into by both parties to such a marriage. The debt review process and the order made affects both parties and cannot be made in respect of only one party to such a marriage. Further; the debt review process is voluntary. Therefore; both parties must voluntarily apply for the debt review process and agree to the debt re-arrangement agreement.
22. Under the circumstances; the debt re-arrangement agreement between the parties for the original consent order was erroneously sought in the absence of the party affected by it, that being the husband in this case. This falls squarely within the ambit of the provisions of Section 165(a) of the Act and the order can therefore be rescinded.

## ORDER

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

23.1 The application to rescind the order is granted. The order made on 16 November 2017 under case number NCT/85609/2017/138 is hereby rescinded.

23.2 There is no order made as to costs.

Authorised for issue by National Consumer Tribunal

Thus done and signed at Centurion on 6 September 2018 Case Number: NCT-109813-2018-165

Date: 2018 / 09 / 11  
C Y / MM / DD

{signed}

Ms H Devraj  
Presiding Tribunal Member

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Mr A Potwana (Tribunal Member) and Adv. J Simpson (Tribunal Member) concurring.