

**IN THE NATIONAL CONSUMER TRIBUNAL  
HELD IN CENTURION**

Case number: NCT/133224/2019/165

In the matter between:

**CAPITEC BANK LIMITED**

Applicant

and

**CLARK GARDNER  
(NCRDC44)**

1<sup>st</sup> Respondent/Debt Counsellor

**MDUDUZI ELLIOUS NTSHABA**

2<sup>nd</sup> Respondent/Consumer

**FOSCHINI RETAIL GROUP (PTY) LTD**

3<sup>rd</sup> Respondent

**RCS CARDS (PTY) LTD**

4<sup>th</sup> Respondent

**TRUWORTHS LIMITED**

5<sup>th</sup> Respondent

Coram:

Mr A Potwana	-	Presiding Tribunal Member
Ms H Devraj	-	Tribunal Member
Prof B Dumisa	-	Tribunal Member
Date of Hearing	-	30 July 2019

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**JUDGMENT AND REASONS**

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**APPLICANT**

1. The Applicant is Capitec Bank Limited; a credit provider that is duly registered with the National Credit Regulator ('the NCR') in terms of the provisions of the National Credit Act 34 of 2005 ('the NCA').
2. At the hearing; the Applicant was represented by Mr T Sehlabela; a candidate attorney from Hammond Pole Attorneys.

**RESPONDENTS**

*agreement and that same was done prior to an application being filed at court or a tribunal, the accounts may not be included in the debt re-arrangement order.'*

11. A supporting affidavit is attached to the Form TI.165. The deponent is Andie Du Bruyn; an adult female who is employed by the Applicant as a Manager: Debt Review. According to Du Bruyn; the Consumer entered into three personal loan agreements with the Applicant. The account numbers are 1492992419, 1492992591 and 6000265807. The consumer had difficulty honouring the repayment terms and applied for debt review. And; *'The proposal received from the Debt Counsellor in the matter; being Clark Gardner, was declined by the Applicant due to the accounts being terminated.'*
12. Notices of termination are annexed to Du Bruyn's affidavit and are dated 17, 18 and 21 May 2018. The notices of termination were served on the Consumer by registered mail and on the Debt Counsellor and the NCR by email (by consent). In the notices of termination; the Applicant stated that: *'Capitec will proceed to enforce all credit agreement(s) that relate to the consumer's debt review within ten (10) business days from date of this letter.'*
13. In her affidavit; Du Bruyn stated –  
*'Due to the fact that the consumer has defaulted and the credit provider taking steps in terms of section 88(3) by terminating the agreements prior to a debt review application being brought before court, it is apparent that there can be no consensus for a consent order where parties are not ad idem in respect of the accounts in question.'*
14. Du Bruyn went on to state that *'the order was from the start not consented to and could not have been granted due to opposition in the matter.'* During the hearing; Sehlabela admitted that consent letters were initially issued; but due to the consumer's failure to pay the three accounts as agreed; the concessions were later revoked *via* the notices of termination.
15. On 30 May 2019; the Tribunal's Registrar issued a notice of filing and served it on all the parties. In terms of Rule 13 of the Rules of the Tribunal<sup>1</sup>; the Respondents had 15 business days to serve an answering affidavit on the Applicant and file the same with the Tribunal's Registrar. The Respondents; however; did not do so.
16. The Applicant did not file an application for a default order in terms of Rule 25(2). On 1 July 2019; and after the closure of pleadings; the Tribunal's Registrar issued a notice of set down for the matter to be heard on a default basis on 30 July 2019. The notice of set down was served on all the parties.

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<sup>1</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.

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

18. Rule 13(5) of the Rules of the Tribunal 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.'*

19. Therefore, in the absence of any answering affidavit filed by the Respondents; the submissions made by the Applicant are deemed to be admitted.

## ISSUES TO BE DECIDED

20. The Tribunal is required to consider whether the balance of probabilities favours the granting of an order rescinding the consent order that was granted by the Tribunal on 29 January 2019 under Tribunal case number NCT/119942/2018/138(1).

## THE LAW

21. Section 86(10) of the NCA states –

*'(a) If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may, at any time at least 60 business days after the date on which the consumer applied for the debt review, give notice to terminate the review in the prescribed manner to*

*(i) the consumer;*

*(ii) the debt counsellor; and*

*(iii) the National Credit Regulator; and*

*(b) No credit provider may terminate an application for debt review lodged in terms of this Act, if such application for debt review has already been filed in a court or in the Tribunal.'*

22. The original application was filed in terms of Section 138(1)(a) of the NCA which states-

*'If a matter has been resolved through the ombud with jurisdiction, consumer court or alternative dispute resolution agent the Tribunal or a court, without hearing any evidence, may confirm that resolution or agreement as a consent order.'*

23. The present application is brought in terms of Section 165 of the NCA. Section 165 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.'*

## CONSIDERATION OF SECTION 165 OF THE NCA

24. Section 165 of the NCA 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:

- 24.1 if the decision or order of the Tribunal was erroneously sought or granted in the absence of a party affected by it;
- 24.2 if there is ambiguity, or an obvious error or omission, but only to the extent of correcting that ambiguity, error or omission; or
- 24.3 if the order was granted as a result of a mistake common to all the parties to the proceedings.

These grounds will be detailed under separate headings.

### 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>2</sup> The court considered the meaning of the words *'erroneously granted'*. This is dealt with in the *Bakoven*-case<sup>3</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>4</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*

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

<sup>3</sup> *Bakoven Ltd v G J Howes (Pty) Ltd* 1990(2) SA.

<sup>4</sup> 1993(1) SA 245 at page 246 to 247.

*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.'*

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.

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.

## ANALYSIS OF THE EVIDENCE

25. It appears from the contents of the Section 138 application case file that the Consumer signed the Power of Attorney giving the Debt Counsellor authority to institute debt review proceedings on 5 May 2018. The Applicant issued the termination notices 60 business days after the Consumer applied for debt review on 17, 18 and 21 July 2018. This was before the Debt Counsellor filed the application for debt review on 14 November 2018. Thus; the debt review process was lawfully

terminated. It follows that; the Debt Counsellor was not supposed to file the application for debt review.

## CONCLUSION

26. Although the Debt Counsellor's reasons for filing the application for a consent order after the Applicant had served the notice of termination is not known; the Debt Counsellor not having filed any papers in the present matter; the balance of probabilities favours the conclusion that; the consent order was erroneously sought.

## ORDER

27. Accordingly; the Tribunal makes the following order:-
- 27.1 The application to rescind the consent order is granted; and
- 27.2 There is no order made as to costs.

Thus; done and signed at Centurion on 31 July 2019.



{signed}

Mr A Potwana  
Presiding Tribunal Member

Authorised for issue by National Consumer Tribunal

Case Number: NCT/133224/2019/165

Date: 2 August 2019

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