

SOUTH AFRICA / JUDGMENT

Maubert v MTN (Pty) Ltd (NCT/81552/2017/75(1)(b)) [2017] ZANCT 143 (15 December 2017) [2017] ZANCT 143

COURT

National Consumer Tribunal

BEFORE

Trevor Bailey

CASE / FILE NUMBER

NCT/81552/2017/75(1)(b)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

AT DURBAN

Case

number: NCT/81552/2017/75(1)(b)

In

the matter between:

FRANCK
MAUBERT
APPLICANT
and
MTN
(PTY)
LTD
RESPONDENT

Coram:

Mr
Trevor Bailey- Tribunal member
Date
of hearing - 20 November 2017

JUDGEMENT

PARTIES

1. The applicant is Franck Maubert (the applicant), an adult male consumer, who resides in a Gillits, KwaZulu-Natal. The applicant appeared in person at the hearing of this application.
2. The respondent is MTN (Pty) Ltd (the respondent), duly registered and incorporated in terms of the company laws of the Republic of South Africa and a licensed financial services provider under licence number 23660. The respondent did not attend the hearing of this application despite having been given notice to do so.

APPLICATION

3. This is an application in terms of section 75(1)(b) of the Consumer Protection Act, 2008 (the CPA) in which the applicant seeks the leave of the National Consumer Tribunal (the Tribunal) to refer the complaint the applicant lodged with the National Consumer Commission (the commission) directly to the Tribunal.

JURISDICTION

4. The Tribunal has jurisdiction to hear an application of this nature in terms of section 27 of the National Credit Act, 34 of 2005 read with section 75(1) (b) of the CPA. Section 75 of the CPA provides that:

“If the Commission issues a notice of non-referral in response to a complaint, other than on the grounds contemplated in section 116, the complainant concerned may refer the matter directly to...the Tribunal, with leave of the Tribunal.”

BACKGROUND

5. On or about 16 February 2017 the applicant filed a complaint against the respondent with the commission in terms of section 71(1) of the CPA for having:
 - 5.1. increased the credit limit in terms of his MTN Broadband Data Package Contract (the contract) without his knowledge and consent; and
 - 5.2. debited the applicant's account in the amount of R3 956.36 (the charges) for data that was used after the Subscriber Identity Module card (SIM card) had been stolen.
6. The applicant complained that the respondent was liable for the charges because the charges would not have been incurred if the respondent had not unilaterally increased the credit limit.

7. The commission considered the complaint and on 20 March 2017 issued a notice of non-referral to the applicant under reference number 12/1/4/02 -17/06438 in terms of section 72(1)(a)(ii) of the CPA because the complaint does not allege any facts which, if true, would constitute grounds for a remedy under the CPA. The commission elaborated in its covering letter to the applicant that:

“The Commission has assessed your complaint and the redress required and determined that the Consumer Protection Act (CPA) cannot be enforced. The supplier's terms and conditions clearly indicate that the data limit is not a guaranteed service. Furthermore, your matter relates to theft and fraud which are criminal offences and the SAPS has jurisdiction over such matters. We cannot pursue your matter, but advise you to pursue your matter with the SAPS.

However in terms of the Consumer Protection Act, you have the right to lodge an appeal against the decision of the NCC by approaching the National Consumer Tribunal.”

8. On or about 12 May 2017 the applicant applied to the Tribunal in terms of section 75(1)(b) of the CPA for an order granting him leave to refer his complaint directly to the Tribunal (the application for leave.)The application for leave was some 13 days late and the applicant then applied to the Tribunal to condone the late referral of the application for leave. On 17 July 2017 the Tribunal issued an order condoning the late filing of the application for leave.

HEARING ON A DEFAULT BASIS

9. The respondent did not appear at the hearing of the application for leave and was not represented. The application for leave was therefore heard on a default basis in accordance with rule 24 of the Tribunal Rules¹[1]. This rule provides that:

“(1) If a party to a matter fails to attend or be represented at any hearing or any proceedings, and that party-

- (a) is the applicant, the presiding member may dismiss the matter by issuing a written ruling; or
- (b) is not the applicant, the presiding member may-
 - (i) continue with the proceedings in the absence of that party; or
 - (ii) adjourn the hearing to a later date.

- (2) The Presiding Member must be satisfied that the party had been properly notified of the date, time and venue the proceedings, before making any decision in terms

of subrule (1).”

10. The Tribunal was satisfied that the respondent had been properly notified of the hearing and proceeded to hear the application for leave.

SUMMARY OF THE APPLICANT'S CASE

11. The applicant stated that on or about 29 January 2013 he concluded the contract with the respondent for a period of 24 months. The contract was activated on 3 February 2013 and the applicant signed for a maximum credit limit of R349.00. At the end of the 24 month period the applicant assumed that the handset, which was included in the contract, became his property and the credit limit was reduced to an amount of R99.00 because the applicant opted to keep the SIM card. The applicant continued to pay a monthly amount of R99.00 for the data bundle in terms of a debit order until the handset (including the SIM card) was stolen in a robbery and he discovered that the respondent had debited the charges to his account.
12. The respondent is a licensed credit provider and therefore bound by the National Credit Act, 2008 (the NCA). The applicant believes that the respondent took liberties by increasing the credit limit to R6 742.00 without his consent and thereby abused his rights as a customer to choose whether or not he wished to increase the credit limit. The applicant believes that the respondent has violated

various provisions of the NCA in that:

12.1. the respondent had undertaken to supply goods and services with an approved credit limit, being R349.00 which had been reduced to R 99.00 at the conclusion of the 24 month period;

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2. a credit provider may only automatically increase the credit limit once every 12 months by an amount that is the smallest of:

12.2.1. the average monthly purchases or cash advances charged to the credit facility by the consumer; or

12.2.2. the average monthly payments made by the consumer during the 12 months before the credit limit is increased;

12.3. an automatic increase of a consumer's credit limit without the consumer having requested the option in writing is contrary to law;

12.4. the respondent granted credit to the applicant without having done a credit assessment; and

12.5. the credit agreement was void because it was amended without the applicant having signed or initialled next to the changes and having been signed by both the parties

13. The applicant does not know on what section of the contract the respondent relied to debit his account. The applicant has paid the charges and cancelled the contract. He seeks a refund of the charges that were unlawfully debited to his account less the monthly amount of R99.00.

ANALYSIS

AND RELEVANT STATUTORY PROVISIONS

14. I must decide whether or not the application for leave should be granted. Ordinarily the Tribunal can only assess the reasonable

prospects of success by considering whether the CPA finds application in the dispute and may therefore be adjudicated by the Tribunal.

15. The applicant referred this matter to the commission, which has issued a notice of non-referral and the applicant seeks the leave of the Tribunal to refer this matter directly to the Tribunal to determine the merits of his case. However, the case that the applicant made out against the respondent at the hearing of the application for leave refers to what the applicant believes are violations of the NCA. Section 136 (1) of the NCA provides that:

"Any person may submit a complaint concerning an alleged contravention of this Act or a complaint concerning an allegation of reckless credit to the National Credit Regulator in the prescribed manner and form."

16. In my view, the applicant is bound by section 136 (1) of the NCA to first submit a complaint to the National Credit Regulator (the NCR) to enable the NCR in terms of its powers under section 139 of the NCA to investigate the applicant's allegations that the respondent has contravened the NCA and therefore engaged in prohibited conduct. After investigating the complaint the NCR may, amongst other things, in accordance with its powers in terms of section 140 (1) or (2) of the NCA either issue a notice of non-referral to the applicant or refer the complaint to the Tribunal if it believes the respondent has engaged in prohibited conduct.

CONCLUSION

17. It follows that the application is premature. The applicant must comply with section 136 (1) of the NCA by first submitting a complaint to the NCR to enable the NCR in terms of its powers under section 139 of the NCA to investigate the applicant's allegations

that the respondent has contravened the NCA and therefore engaged in prohibited conduct. This application for leave must therefore fail.

ORDER

18. Accordingly:

18.1. the application for leave to refer the applicant's complaint directly to the Tribunal is dismissed; and

18.2. there is no order as to costs.

DATED AT CENTURION ON THIS 15TH DAY OF DECEMBER 2017

TREVOR BAILEY

Tribunal member

Maubert.MTN.81552.2017

- [1] 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)
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