

SOUTH AFRICA / JUDGMENT

Mosaic Connections CC v First National Bank Limited (NCT/3294/2015/137(3)) [2016] ZANCT 16 (10 May 2016)

[2016] ZANCT 16

COURT

National Consumer Tribunal

BEFORE

J Simpson, B Dumisa, F Sibanda

CASE / FILE NUMBER

NCT/3294/2015/137(3)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

No: NCT/32949/2015/137(3)

In

the matter between:

MOSAIC
CONNECTIONS
CC
APPLICANT
AND
FIRST
NATIONAL BANK LIMITED
RESPONDENT

Coram:	Adv J Simpson - Presiding Member Prof B Dumisa - Member Mr F Sibanda - Member Date
of Hearing:	17 March 2016 Date
of Judgment:	10 May 2016

JUDGMENT

AND REASONS

PARTIES

1 The Applicant is Mosaic Connections CC, a company duly registered in terms of the company laws of the Republic (hereinafter referred to as “the Applicant”). At the hearing the Applicant was represented by its sole member, Mr Mario Compagnoni.

2 The Respondent is First National Bank (FNB), a company duly registered in terms of the company laws of the Republic (hereinafter referred to as “the Respondent”) and a registered credit provider with the National Credit Regulator (hereinafter referred to as “the Regulator”), with registration No. NCRCP20.

3 At the hearing the Respondent was represented by L Kannieappan of Glover Kannieappan Inc. Attorneys.

INTRODUCTION

4 The Applicant applied to the National Consumer Tribunal (“the Tribunal”) in terms of section 137(3) of the National Credit Act, No 34 of 2005 (“the Act”), upon failure of alternative dispute resolution between the Applicant and the Respondent.

5 Section 137(3) of the Act provides that –

“A consumer or credit provider who has unsuccessfully attempted to resolve a dispute directly with the other party and through alternative dispute resolution in terms of section 134(4) may file an application contemplated in this Act at any time...”

6 The Tribunal can hear this matter in terms of section 27(a)(i) of the Act, which provides that the Tribunal may adjudicate in relation to any application made to it in terms of the Act, and make any order provided for in the Act in respect of such application.

7 The matter was heard on 17 March 2016.

BACKGROUND

8 It bears mentioning at the outset that the Applicant in this matter is a layperson and had some difficulty in presenting his application to the Tribunal, especially as it relates to the Act and the Consumer Protection Act No 68 of 2008 (“the CPA”). The Tribunal therefore also guided him to a certain extent when he addressed the Tribunal on the points in limine and the merits of the matter. The judgment that follows attempts to identify the most relevant aspects of the matter.

9 In early 2011 the Respondent ran an advertising campaign to introduce a bank account targeted at small businesses. A key feature of this new account was the fact that customers would not be charged a fixed monthly account fee. Instead consumers would be charged a fee per transaction.

10 On 9 March 2011 the Applicant, influenced by these advertising campaigns, opened the FNB Business Essential Account (“the account”).

11 Between March 2011 and 7 June 2014 the Applicant was not charged monthly service fees on the account.

12 On 12 June 2014 the Applicant received an account statement dated 9 June 2014 reflecting a monthly account fee of R55.50 which had never been charged before. The Applicant immediately contacted Mr James Owen Fowle, the Chief Executive Officer of Premium and Business Core Banking, a business unit of the Respondent, requesting the reversal of the monthly account fee and a return to the agreed ‘per-transaction’ fee.

13 The Respondent replied, through Mr Fowle, on 13 June 2014, indicating that there was no subterfuge on its part in introducing the fixed monthly account fee and apologising that the communication sent out was not clearer so as to have prevented this misunderstanding.

14 Further communication continued between the parties until 8 July 2014 when the Applicant received correspondence from the Respondent declaring a deadlock and further advising that the Applicant can approach the Ombudsman for Banking Services for resolution of the dispute.

15 On 15 August 2014 the Applicant lodged a complaint with the National Consumer Commission (“the NCC”), alleging, among other things, misleading advertising and unfair dealing by the Respondent, in contravention of the Consumer Protection Act No 68 of 2008 (“the CPA”).

16 On 11 September 2014 the NCC referred the Applicant's complaint to the Ombudsman for Banking Services.

17 On 8 June 2015 the Ombudsman for Banking Services advised the Applicant that the complaint falls outside its jurisdiction and as such is unable to deal with it. It completed a certificate for the Applicant which constitutes a failed attempt at alternative dispute resolution in terms of section 134(5) of the Act.

18 Subsequently, the Applicant approached the Regulator who after investigating the complaint issued a notice of non-referral, on 8 September 2015, in terms of section 140(1)(a) of the Act.

19 The Applicant then approached the Tribunal directly in accordance with section 137(3) of the Act, for an order that the Respondent must remedy the violations of the CPA.

20 The basis of the relief sought by the Applicant is that there is prima facie evidence that the Respondent appears to be contravening various provisions of the CPA, including but not limited to sections 22, 30, 40, 41 and 52; as well as having reneged on an Agreement between the Applicant and the Respondent.

21 In its answering affidavit the Respondent raised a point in limine concerning the Tribunal's jurisdiction to hear this matter.

ISSUES

TO BE DECIDED

22 The Tribunal must decide whether:

- 1.1 it has jurisdiction to hear the matter;
- 1.2 the Respondent has committed prohibited conduct;
- 1.3 it can order the prayers asked by the Applicant.

APPLICANT'S CASE

23 The Applicant alleges that the pricing structure contained in the agreement with the Respondent when the account was opened in March

2011, was that there would be a 'transaction/pay as you use' fee only and no fixed monthly account fee.

24 The Respondent unilaterally introduced an additional pricing structure, that is, the monthly account fee, in violation of the agreement's

substantive condition, agreed upfront with the Respondent, that there would be no fixed monthly fee.

25 By giving one month or one year notice before introducing the monthly account fee does not alter the fact that the Respondent reneged on the agreement with the Applicant by unilaterally imposing a monthly account fee from June 2014.

26 The justification by the Respondent that it was obliged to do away with the 'per transaction' fee because it was finding it to be costly, is not a sufficient basis for reneging on the agreement. The Respondent ought to have considered the viability of the product before heavily promoting and launching it.

27 In the event therefore, the only conclusion to reach is that the high profile advertising of this product, with the specific central

feature of 'no monthly account fee', constitutes bait marketing, as per section 30 of the CPA.

RESPONDENT'S CASE

28 The Respondent raised a point in limine with regards to the Tribunal's jurisdiction on the grounds that:

28.1 First, the account that is the subject of the dispute is a cheque account and does not have a credit facility linked to it. Therefore the Act does not apply to the account. The account is a financial product and falls within the ambit of financial services as defined in section 1 of the Financial Advisory and Intermediary Services Act, No 37 of 2002. In light of this, the provisions of the Act are not applicable and this matter cannot be referred to the Tribunal in terms of section 137(3) of the Act.

28.2 Second, the Applicant alleges that the Respondent appears to be contravening various provisions of the CPA, specifically sections 22, 30, 40, 41 and 52 of the CPA. However, Rule 3(1) of the Rules for the Conduct of Matters Before the National Consumer Tribunal (Tribunal Rules) lists the matters that may be dealt with by the Tribunal. Table 1B of the Tribunal Rules excludes the sections that the Applicant is alleged to have contravened.

29 Consequently, the Tribunal does not have jurisdiction to hear this application pertaining to the Respondent's alleged contraventions of the Act and the CPA and as such the application should be dismissed.

ANALYSIS

OF THE LAW AND THE FACTS

Point in limine: Tribunal's jurisdiction

National Credit Act

"(1) Subject to subsection (2), an agreement constitutes a credit agreement for the purposes of this Act if it is –

(a) a credit facility, as described in subsection (3);

- (b) a credit transaction, as described in subsection (4);
 - (c) a credit guarantee, as described in subsection (5); or
 - (d) any combination of the above.
- (2)
- (3) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2) or section 4(6)(b), constitutes a credit facility if, in terms of that agreement –
- (a) a credit provider undertakes –
 - (i) to supply goods or services or to pay an amount or amounts, as determined by the consumer from time to time, to the consumer or on behalf of, or at the direction of, the consumer; and
 - (ii) either to –
 - (aa) defer the consumer's obligation to pay any part of the cost of goods or services, or to repay to the credit provider any part of 45 an amount contemplated in subparagraph (i); or
 - (bb) bill the consumer periodically for any part of the cost of goods or services, or any part of an amount, contemplated in subparagraph (i); and
 - (b) any charge, fee or interest is payable to the credit provider in respect of –
 - (i) any amount deferred as contemplated in paragraph (a)(ii)(aa); or
 - (ii) any amount billed as contemplated in paragraph (a)(ii)(bb) and not paid within the time provided in the agreement.”

31 The Respondent insists that the account does not have a credit facility linked to it, and specifically it is not linked to an overdraft

facility. However, according to the Applicant the account has an overdraft facility on which interest is charged when used. In the replying affidavit[1] the Applicant specifically states that he used the overdraft facility minimally and says he has phone recordings of an unsolicited call received from the Respondent's representative seeking to increase the overdraft limit.

32 It is common cause that the Applicant opened the FNB Essential Account, which is a cheque account, whose primary purpose is to conduct

general banking transactions, including making deposits, withdrawals, payments and purchases.

33 While this account may be linked to an overdraft facility, the latter is in any event not the subject of the dispute. What is at issue is the monthly account fee charged on the transactional account.

34 Therefore, when regard is had to the definition of a credit agreement and credit facility above, a cheque account does not qualify as either of the two. That being the case, the fees charged on the account are not regulated in terms of the Act.

Consumer Protection Act

[1] Page 52 of the bundle, para 4.2.1.1

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