

SOUTH AFRICA / JUDGMENT

Reg 44 fairness (201606-0007707)

[2016] ZACGSO 12 (29 August 2016)

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COURT

Consumer Goods and Services Ombud

CASE / FILE NUMBER

201606-0007707

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Per E-mail

ASSESSMENT:

The above matter, as well as the Customer Complaint Form has reference.

Summary of the complaint

The complainant purchased a watch for R5 800.00 through the supplier in terms of an instalment agreement of 24 months. If once reaches the supplier's fitness goals set every month, the supplier will pay the monthly instalment for the watch.

After the complainant looked at all the required goals and how to achieve them he decided that they were reasonable and decided to go ahead with the deal.

The complainant listed three points which he believes are important for this deal:

1.) The fine print does indicate that the supplier is at liberty to change the goals at any time.

According to the complainant he believes that in such an agreement that if the goals are changed it should still honour the spirit of the agreement and the goals should remain achievable.

2.) As per the original agreement one could achieve the goals in many ways: cycling, running, going to the gym, hiking, climbing mountains which made it practical.

3.) As you achieved your goals they will gradually increase. According to the complainant the supplier's representative verbally advised that the goals would never increase to more than 50 points per week and maximum goal would be 1 200 per week.

The complainant soon realised that the Watch could not do what it was marketed as being able to do as it cannot accurately monitor your pulse rate during exercise which is necessary to achieve one's goals.

In April 2016 the supplier also changed the rules in such a way that those who do not run, cycle or swim for exercise will not be able to meet the goals.

As per regulation 44(i) of the Consumer Protection Act the supplier is prevented from unilaterally amending the contract terms. With the new changes the complainant is not able to meet the goals and would like the supplier to revert back to the old rules.

The only reasonable solution according to the complainant would be

- a.) To keep the watch and revert to the rules effective when it was purchased.
- b.) Return the watch and cancel the contract.

Summary of The supplier's response

According to Rule 7 of the supplier's main rules it may adjust the number of points that a member can earn for each fitness activity "depending on how important the activity is to [the member's] health status." Rule 10 provides that the supplier "may change these rules and the benefit rules from time to time. Generally, changes take effect from 1 January, although [The supplier] occasionally changes the rules during the calendar year." Rule 10 further provides that The supplier undertakes to give members advance notice of the changes to all members and dropped all Active Rewards member point's goal to 300 points to allow then the opportunity to adjust to the new points earning rules.

The supplier further advised that the amendments to the fitness points earning rules did not amend the terms and conditions regulating the Apple Watch Benefits. The supplier Rewards is a separate benefit from the Watch Benefit and should be activated prior to a member being able to qualify for the Watch Benefit. The supplier has however referred the matter to its Review Committee which offered as a gesture of goodwill to cancel the agreement.

Steps taken to resolve the matter

The complainant was not happy with the feedback and our office responded to the supplier who advised that its Active Rewards will change on 20 August 2016 and will bring back some of the previous goals. The complainant however advised that he is still not able to meet the goals and wants to revert back to the terms and conditions when he entered into the agreement

Assessment

We have considered all the evidence presented by both the complainant and the supplier and advise as follows:

Although the supplier advised that the Watch Benefit rules have not changed, the Watch Benefits' terms and conditions do not specify the number of points a member would earn by participating in the Watch Benefit. The supplier's Points system is therefore incorporated onto the Watch Benefit terms and conditions by reference. Therefore, the rules and goals have changed as per Rule 7 and 10 of the Points System's terms and conditions.

In this regard the supplier's terms and conditions allow the supplier to unilaterally change the contract terms. The complainant

believes this is not fair and would like to revert back to the rules when he first signed up for this deal.

Section 48 of the Consumer Protection Act sets out the general prohibition against unfair, unreasonable or unjust contract terms. It also provides general guidelines to establish whether a term is unfair. A term or notice is considered unfair if it is excessively one-sided in favour of any person other than the consumer. Further to this Regulation 44(3) has a grey list of a number of terms which are presumptively unfair because they are typically excessively one-sided.

The grey- list terms mean the terms are presumed to be unfair but this does not automatically invalidate the contract term. It may still be fair in a particular circumstance of the case. Therefore including such terms and implementing them must be done in a fair and reasonable manner.

According to the supplier these changes are fair and reasonable as it is a dynamic system and changes will be based on the principles of behavioural economics. The complainant believes that the changes are not fair as even with the updated goals he will still not be able to meet the goals which means he will have to pay for the watch which is contrary to the spirit of the agreement.

Our office will not be able to determine if the changes were reasonable and if consumers will now be able to meet the targets with the updated goals as from 20 August 2016.

It must however be noted that even if we cannot conclude on the fairness of the changes, the Consumer Protection Act does provide a remedy in the case of unilateral changes. In terms of Regulation 44(4)(c)(i) & (iv) a consumer must immediately be informed of the change and the consumer is then free to dissolve the agreement.

The supplier has made an offer in which they agreed that they will cancel the transaction and the complainant will be placed in the financial position he would have been had the fitness point changes not occurred.

We can therefore only suggest that the complainant consider this offer, as the provisions of the Consumer Protection Act do not provide a basis upon which we can instruct the supplier to change back to the original goals before the change in April 2016. This offer is also in line with the proposed outcome made by the complainant in the complaint form where it was requested to revert back to the original goals or to cancel the agreement.

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