

RECOMMENDATION

1. Dispute identification

Complaint No. : 201512-0005391

Nature of dispute : Agreement: Plain Language

Adjudicator : N Melville

Date : 22 January 2016

2. Summary of the complaint

The supplier offers the X value added service. X then offers the Team X value added service. The function of Team X, amongst other things, is to provide a central platform to register for professional sporting associations (cycling/running) and then to provide a cash back % on selected race event entry fees.

The terms and conditions that are provided with this service are very vague and missing several crucial details. As a result the complainant interprets several definitions and terms in one way and Team X enforces them in a different way that negatively impacts and prejudices him. He believes this is deliberately misleading in an effort to prejudicially extract more money from him.

The supplier's terms and conditions are:

- 1.The registration fee is R600;
- 2.There is a no-cancellation policy;
- 3.The registration terminates on 31 December 2015;
- 4.The registration is valid for one(1) calendar year;
- 5.You must be registered as a member at the time cash back is paid out.
- 6.The event must be registered within 3 months of completion.
- 7.The supplier has not defined 'Calendar Year' upfront in the document, as is required in any body of rules and regulations. Further investigation of all the available resources on their web page at the time of entering into the agreement did not produce any further clarity on the definitions and understandings.

The supplier however refuses to pay out on any event that happened before a member paid the registration fee. This appears to contradict points 3 and 4: If the

calendar year terminates on 31 December 2015, then the start date must be 1 January 2015.

Accordingly, if he is not paid the R600 event entrance fee he paid in August 2015, he will not be getting one calendar year's' worth of benefits, but 4 months' worth [presumably September to December].

The supplier has refused to either refund the complainant a pro rata amount of his registration fee or accept that the start date of the registration was in fact 1 January 2015. He takes exception to not having been notified up front of the supplier's intention.

3. The response of the supplier

The complainant joined Team X on 11 August 2015 and was therefore not an active Team X member when he signed up for his event. It referred to its benefit guide:

Earning cash back

How to earn up to 50% cash back with Team X

To qualify for up to 50% cash back:

☐ The event must be one of the selected, timed events on the Team X race calendar that qualifies for either a 25% cash back or 50% cash back.

☐ You must have completed the event.

☐ You must be a Team X member at the time the cash back is awarded.

...

☐ Cash back will be awarded automatically after you complete the online form and we can verify that you have completed the event.

☐ You have three months after the race in which to upload your race details on the outdoor sporting events to qualify for cash back.

In email correspondence to the complainant, the supplier stated:

“You would have needed to register for the event as an active Team X member in order to qualify for the cash-backs...

When you activate Team X and pay the registrations fee, there is a “no cancellation” policy. This means that we will not be able to refund you once the registration fee has been paid. If you choose to terminate the benefit or your X policy, the ordinary rules for the termination of a benefit and X membership will apply.”

In its response to CGSO, the supplier stated in regard to the complainant's suggestion of cancellation: "Team X membership is valid for one calendar year which begins on 01 January and it will end automatically on 31 December each year... We cannot refund the activation fee nor can we pro rate the fee for 2015."

4. Complainant's reply

From the paperwork the supplier made available to him, and therefore the only paperwork that is admissible, the supplier's rules say is that he gets access to a calendar years' worth of benefits, expiring on 31 December. He had to register the event within 3 months of completion and had to be a member when the benefit is paid out.

5. Defining the issues

It is necessary to decide whether the complainant is entitled to claim for a partial refund of event fees paid before he activated his membership on the grounds that either this is what the agreement says or that the agreement was not in understandable plain language.

6. Legal considerations

Applicable provisions of the CPA:

Section 2 (1) states the Act must be interpreted in a manner that gives effect to the purposes set out in section 3. These include:

3(1)(c) promoting fair business practices;

...

(e) improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour.

Section 4(2)(b)(i) requires a court or the Tribunal to promote the spirit and purposes of the Act. An aspect of that spirit is found in section 2(9) (b), which requires that in the case of a conflict if the provisions of the legislation, the provision that extends the greater protection to a consumer prevails over the alternative provision.

The plain language rule is set out in section 22 (2):

For the purposes of this Act, a notice, document or visual representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort, having regard to—

- (a) the context, comprehensiveness and consistency of the notice, document or visual representation;
- (b) the organisation, form and style of the notice, document or visual representation;
- (c) the vocabulary, usage and sentence structure of the notice, document or visual representation; and
- (d) the use of any illustrations, examples, headings or other aids to reading and understanding.

The rule is extended to any written agreement by section 50(2):

If a consumer agreement between a supplier and a consumer is in writing, whether as required by this Act or voluntarily—

...

- (b) the supplier must provide the consumer with a free copy, or free electronic access to a copy, of the terms and conditions of that agreement, which must—
 - (i) satisfy the requirements of section 22 [plain language]...

Section 48 (1) prohibits a supplier from

- (a) offering to supply, supply, or enter into an agreement to supply, any goods or services—
 - ...(ii) on terms that are unfair, unreasonable or unjust.

Section 51(1) prohibits a supplier from avoiding the provisions of the CPA:

A supplier must not make a transaction or agreement subject to any term or condition if—

- (a) its general purpose or effect is to—
 - (i) defeat the purposes and policy of this Act;

Other authority:

Naude & Eiselen et al *Commentary on the Consumer Protection Act 2014* Juta Section 22-4 fn 1

Section 64 of the National Credit Act (NCA) is identical to s 22 of the CPA. This means that court decisions regarding the NCA are relevant to the CPA.

As to the effect of an agreement not being in plain language:

Section 22-11

Furthermore, s 51(1)(b)(i)-(iii) states that a supplier may not enter into a transaction or agreement subject to a term or a condition if it directly or indirectly purports to waive or deprive the consumer of a right in terms of the act or avoid a supplier's obligation or duty in terms of the act or override the effect of any provisions of the act. Section 50 (2)(b)(i) requires agreements to be written in plain and understandable language. Section 51 (3) provides that the transaction or agreement, provision, term or condition of a transaction or agreement is void to the extent that it contravenes s 51. Therefore, one may argue that if an agreement is not written in plain and understandable language as required in terms of s 50 (2)(b)(i), the agreement, provision, term or condition of the agreement will be void in terms of 51 (3). If an agreement, term or condition of agreement is void, the court may sever any part of the agreement or provisions or alter it to the extent required to render it lawful or declare the entire agreement or provision void as from the date it purportedly took effect.

Case law

Standard Bank of South Africa Ltd v Dlamini (2877/2011) [2012] ZAKZDHC 64

This case dealt with the section of the National Credit Act that deals with plain language and is equivalent to s. 22 of the CPA.

Para 40

If the unlawfulness was confined only to not recording fully and communicating clause 10.6 of the agreement to Mr Dlamini, then clause 10.6 could have been altered to render it lawful. If such notice was important to the Bank then it should have included it in the agreement as a material procedural step not only to surrender but also to claim a refund. It should also have ensured that Mr Dlamini was aware of it.

Para 67

When the form and get-up of the agreement is inconsistent with the NCA and its regulations, and the Bank has not interpreted, translated or explained its material terms, severance is not an option. The entire agreement must be set aside.

Sonap Petroleum (South Africa) (Pty) Ltd v Pappadogianis (483/90) [1992] ZASCA 560.

Where the other party is aware of the error, he may not take advantage of it, or “snatch at a bargain”

Hypercheck (Pty) Ltd v Mutual and Federal Insurance Company Ltd (2010/2695) [2012] ZAGPJHC 2 at 9

The “golden rule” of interpretation:

Words in an agreement must be given their plain, ordinary, popular and grammatical meaning, unless this would result in some absurdity, or it is evident from the context that the parties intended the words in question to bear a different meaning.

The *contra proferentem* rule

If the meaning of a word or clause in an agreement is not clear, or the word or clause is ambiguous, the *verba fortius accipiuntur contra proferentem* rule is applicable i.e. a written document must be construed against the person who drafted it.

7. Consideration of facts and law

It is not clear whether the claim is in respect one or two separate events as in correspondence the complainant mentions an event of 6 June 2015 and in the complaint form an event entrance fee he paid in August 2015. It is not however necessary at this point to seek further clarity as it is common cause between the parties that the complainant entered at least one event before his membership was processed.

The matter turns rather on the terms of the agreement: Each party has a different view as to what they mean. The first question to be considered is the agreement in plain language that would be understood by the class of persons for whom the notice, document or visual representation is intended. The word understand must be read to mean not merely that the content is understandable but also that the significance of the agreement as a whole and the way it is intended to work is conveyed in a manner that truly enables the consumer to make an informed decision as contemplated in section 3(1)(e).

Before embarking upon an elaborate enquiry in this regard, it makes sense to consider first whether the agreement (benefit guide)¹ is understandable to a person with legal training. The crucial issue in this regard is when the agreement came into effect. The supplier contends that it was only when the complainant signed up for membership while the complainant says that was with effect from the beginning of 2015.

The agreement does not expressly state when the terms come into effect. It does however require that a person is a Team X member at the time the cash back is awarded.

The supplier's statement that "Team X membership is valid for one calendar year² which begins on 01 January and it will end automatically on 31 December each year" supports the complainant's argument that once he became a member, he could claim for any event during the year.

Following the ruling in the *Standard Bank* case, the date on which the agreement becomes effective is a material term. If it was to the effect that the agreement and benefits only applied to the balance of the calendar year after the complainant became a member, this should have been brought to the attention of the complainant. The supplier should have ensured that the complainant was aware of it. The consumer might not have entered into the agreement had he known that he would have to pay the full annual fee but only receive the benefit of the agreement for four months.

Another consideration is that, even if there was a term to the effect that the entitlement to benefits only arose at the date of becoming a member, it would be necessary to consider whether the term ought to be struck out for not being fair. It does not seem fair that a consumer's potential benefits would progressively reduce as the year advanced but the fee they paid remained the same irrespective of when they paid it. Fairness dictates that if it is the intention of the supplier that a consumer is only entitled to benefits after becoming a member, the joining fee should reduce proportionately as the year runs down. This type of arrangement is a common feature of membership based organisations.

In order for the agreement to have the meaning that supplier wishes to give it, it should have said something like:

¹ The supplier did not refer to any other document so it can be concluded that this is the sole applicable document.

² The complainant queried the definition of calendar year. It is a period of a year beginning and ending with the dates that are conventionally accepted as marking the beginning and end of a numbered year (<http://www.merriam-webster.com/dictionary/calendar%20year>).

4. The registration is valid ~~for one(1) calendar year~~ from the date of acceptance by [the supplier] until 31 December of the year in which the registration takes place and the member shall only be entitled to claim benefits as from the date of acceptance;

5. You must be registered as a member at the time of the event.

The present requirement of “when the cash back is awarded” might operate unfairly as a member is given three months after the race in which to upload their race details. This would prevent a member who joined for only one year on the first of January of a year from claiming for a race run on 31 December of the same year. It is not however necessary to make a decision on this aspect for this matter.

It also needs to be considered whether giving effect to the plain meaning of the words of the agreement would lead to an absurd result. The supplier might argue that if it is bound by the absence of words to the effect that the benefits commenced with membership, this would mean that it could be liable for multiple claims that arose before that date. The complainant could on the other hand argue that he would have received no greater benefit than he would have been entitled to had he signed up on 1 January 2015, for the same fee. The two arguments appear evenly balanced.

Finally, in terms of the *contra proferentem* rule, any lack of clarity must be held against the person who drafted the agreement, the supplier. This is in line with the spirit of the CPA, to prefer the interpretation that extends the greater protection to the consumer.

There is nothing in the papers before CGSO to support the complainant’s contention that the supplier is deliberately misleading in its agreement.

In light of all these considerations it is concluded that the agreement does not have the meaning that the supplier intended it to have and the supplier did not communicate any other material term to the complainant. If this was as a result of an error on the part of the supplier, there is nothing to indicate that the complainant was aware there was an error or improperly tried to exploit the error, or “snatch at a bargain”: There is not the multiplicity of claims that usually accompany this practice.

Accordingly, the complainant’s claim should succeed.

6. Conclusion

The agreement does not say what the supplier intends it to say and accordingly it is not capable of being understood as such by a lawyer, let alone the complainant. Therefore it is not in plain language as defined in the CPA. The uncertainty must be resolved in favour of the complainant and the agreement construed to mean that it is valid for the entire year in which membership is taken out.

The Complainant does not seek to void the contract. The Complainant is accordingly entitled to claim in respect of events that took place during the course of the year, so long as he complies with the other requirements.

7. Recommended resolution

In view of the above conclusion, it is recommended that the supplier pays the complainant for the event or events if there was more than one that he claimed in respect of, in accordance with the provisions of the benefit guide.