

RECOMMENDATION

1. Dispute identification

Complaint No. : 201602-0006059

Nature of dispute : Cancellation of time share agreement

Adjudicator : N Melville

Date : 22 March 2016

2. Summary of the complaint

On 10 October 2015, the consumer signed an agreement for timeshare at X along with her friend (unnamed). Together they paid the deposit of R 6 300. Within a month of the agreement being signed, the consumer's friend moved elsewhere and as a result the consumer realised she would not be able to afford the monthly instalment by herself. Accordingly, she informed the supplier on 24 November 2015 of her intention to withdraw from the agreement.

3. Details of steps taken to resolve the complaint

Taken up with the supplier by email.

4. Outcome proposed

The complainant seeks the cancellation of her contract and the repayment of her deposit, less administration fees.

5. The response of the supplier

In response to the complainant's allegations:

Miss M. signed an agreement for X on 10 October 2015. This agreement, contract number ---, was received and accepted by our offices on 30/10/2015. The Acknowledgement of Presentation, Point nr 5, which the client signed, clearly states that the client has a period of 5 working days from signing the agreement to cancel in writing should they not be totally satisfied with the purchase and want to withdraw from the agreement.

A cancellation request was received from Miss M. on 24/11/2015. This falls outside the cooling off period and therefore does not qualify the client for a refund of deposit.

The agreement can be cancelled subject to the payment of a cancellation fee. The cancellation fee is charged to cover the costs that we incurred as a Company including commission, administrative costs etc.

Kindly note that a cancellation fee of R20 331.50 was offered to the member and we advised Miss M. that it can be paid as a once off or alternatively over a period of 6 to 12 months.

7. The law

Consumer Protection Act (CPA)

1. “goods” includes—

(d) a legal interest in land or any other immovable property, other than an interest that falls within the definition of ‘service’ in this section;

2 (9) If there is an inconsistency between any provision of this Act and a provision of any Act not contemplated in subsection (8)— (a) the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second; and

(b) to the extent that paragraph (a) cannot apply, the provision that extends the greater protection to a consumer prevails over the alternative provision...

5 (2) This Act does not apply to any transaction—

...

(d) that constitutes a credit agreement under the National Credit Act, but the goods or services that are the subject of the credit agreement are not excluded from the ambit of this Act;

14 (2) (b) despite any provision of the consumer agreement to the contrary—

(i) the consumer may cancel that agreement—

(aa) upon the expiry of its fixed term, without penalty or charge, but subject to subsection (3)(a); or

(bb) at any other time, by giving the supplier 20 business days’ notice in writing or other recorded manner and form, subject to subsection (3)(a) and (b); or ...

(3) Upon cancellation of a consumer agreement as contemplated in subsection

(1)(b)—

- (a) the consumer remains liable to the supplier for any amounts owed to the supplier in terms of that agreement up to the date of cancellation; and
- (b) the supplier—
 - (i) may impose a reasonable cancellation penalty with respect to any goods supplied, services provided, or discounts granted, to the consumer in contemplation of the agreement enduring for its intended fixed term, if any; and
 - (ii) must credit the consumer with any amount that remains the property of the consumer as of the date of cancellation, as prescribed in terms of subsection (4).

Regulation 5(2)

For purposes of section 14(3), a reasonable credit or charge as contemplated in section 14(4)(c) may not exceed a reasonable amount, taking into account-

- (a) the amount which the consumer is still liable for to the supplier up to the date of cancellation;
- (b) the value of the transaction up to cancellation;
- (c) the value of the goods which will remain in the possession of the consumer after cancellation;
- (d) the value of the goods that are returned to the supplier;
- (e) the duration of the consumer agreement as initially agreed;
- (f) losses suffered or benefits accrued by consumer as a result of the consumer entering into the consumer agreement;
- (g) the nature of the goods or services that were reserved or booked;
- (h) the length of notice of cancellation provided by the consumer;
- (i) the reasonable potential for the service provider, acting diligently, to find an alternative consumer between the time of receiving the cancellation notice and the time of the cancelled reservation; and
- (j) the general practice of the relevant industry.

Regulation 5 (3)

Notwithstanding subregulation (2) above, the supplier may not charge a charge which would have the effect of negating the consumer's right to cancel a fixed term consumer agreement as afforded to the consumer by the Act.

National Credit Act (NCA)

121. (1) This section applies only in respect of a lease or an instalment agreement entered into at any location other than the registered business premises of the credit provider.

(2) A consumer may terminate a credit agreement within five business days after the date on which the agreement was signed by the consumer...

When consumer may terminate agreement

122. (1) A consumer may terminate a credit agreement at any time by paying the settlement amount to the credit provider, in accordance with section 125.

125. (1) A consumer or guarantor is entitled to settle the credit agreement at any time, with or without advance notice to the credit provider.

127. (1) A consumer under an instalment agreement, secured loan or lease-

(a) may give written notice to the credit provider to terminate the agreement; and

(b) if-

(i) the goods are in the credit provider's possession, require the credit provider to sell the goods; or

(ii) otherwise, return the goods that are the subject of that agreement to the credit provider's place of business during ordinary business hours within five business days after the date of the notice or within such other period or at such other time or place as may be agreed with the credit provider...

(5) After selling any goods in terms of this section, a credit provider must-

(a) credit or debit the consumer with a payment or charge equivalent to the proceeds of the sale less any expenses reasonably incurred by the credit provider in connection with the sale of the goods; and

Case law

MFC (a division of Nedbank Ltd) v Botha (6981/13) [2013] ZAWCHC 107

This case involved a consumer who wished to return a vehicle purchased by means of an instalment sale agreement because of its defective condition. The consumer attempted to rely upon sections 55 and 56 of the CPA.

At para 10 Binns-Ward J noted the lack of clarity in the relevant provision and the absence of any reported judicial interpretation thereof.

[The judgment has been criticised for having failed to apply the law correctly and to seize the opportunity to clarify the interplay between the CPA and the NCA.¹]

6. Consideration of the law and facts

It appears from the information available that there is a credit agreement in addition to the Acknowledgement of Presentation of which CGSO has been given

¹ https://jutralaw.co.za/newsletter/newsletter/consumer-law-database_april-2013-2-1-1-1-1-1-1-1-2/;
http://www.academia.edu/11384243/Otto_JM_van_Heerden_CM_and_Barnard_J_Redress_in_terms_of_the_National_Credit_Act_and_the_Consumer_Protection_Act_for_defective_goods_sold_and_finance_in_terms_of_an_instalment_agreement_2014_2_SA_Merc_LJ_247-281

a copy. The identity of the credit provider is not evident from the papers. Whether the CPA or the NCA applies is a vexed question. There is authority for the view that the provisions of both Acts (NCA and CPA) apply concurrently to credit transactions.² Further, CPA section 2(9) states that in the case of an inconsistency between the CPA and another Act, the provision that extends the greater protection to a consumer prevails. Even if there are two separate agreements in this case, they are inexorably linked to each other.

The first issue to consider is whether the consumer cancelled within the cooling off period. As the agreement appears to have been entered into at the supplier's registered business premises, the five business days cooling off period provided for in NCA section 121(1) does not apply. In any event, the cancellation took place more than five business days after the date on which the agreement was signed by the consumer.

The acknowledgement of presentation however provides a contractual cooling off period in clause 5:

“I understand that this purchase is subject to acceptance by the Seller and the approval by Y. Should I not be totally satisfied of my purchase and wish to withdraw, I must give the Seller written notice, which notice must be received by them within five working days of my contract having been concluded.”

Whether or not intended by the Seller, the effect of this clause is that the five working days only start running when the contract is concluded, which is when the acceptance of the offer by the Seller is communicated to the purchaser/ offeror. This does not however assist the consumer as the acceptance apparently took place on 30 October 2015 and the consumer cancelled well after that, on 24 November 2015.

It then remains to consider how to deal with the cancellation of what may be two contracts: the sale of the timeshare unit and the credit agreement pertaining to the payment of the purchase price. Unfortunately, the South African legislators did not take a similar approach to that taken in EU Directive 2008/122/EC on Timeshare, Long-Term Holiday Products, Resale and Exchange Contracts, which in article 16 provides for the automatic cancellation at no cost to the consumer of related credit agreements when a time share contract is cancelled. This clearly acknowledges the existence of two separate contracts or agreements.

² Naudé and Eiselen *Commentary on the Consumer Protection Act* (Original Service, 2014) Juta at 5-35 para 96; Melville and Palmer “The applicability of the Consumer Protection Act 2008 to credit agreements” (2010) SA Merc LJ 272-6 and Otto and Barnard (footnote 1 above).

Although the decision of an ombud bears some weight under CPA section 2(2), this office is a dispute resolution body rather than a law making body. Accordingly, it is proposed that a practical solution to the present dispute be found.

Under the common law, an innocent party is under an obligation to mitigate its loss i.e. find someone else to replace the consumer. This is mirrored in NCA section 127(1)(b) and CPA section 14, read with Reg 5(2)(i). So whichever Act applies, the Seller/ supplier is obliged to try to find an alternative consumer/ purchaser. Having resold the property, the supplier may withhold only any expenses reasonably incurred by the credit provider in connection with the sale of the goods under the NCA or a reasonable cancellation penalty under the CPA. We have expressed the view in our advisory note on cancellations that this means the consumer will only be charged an administrative fee based on actual costs.³

The outcome is similar whichever approach is taken, although, if the NCA process is followed, the supplier is required to comply with various formalities under section 127.⁴

9. Recommended resolution

With a view to reaching a fair resolution of this matter, it is recommended that the supplier accepts the cancellation of the agreement and reimburses the consumer the deposit paid, less any expenses reasonably incurred by the credit provider in connection with the sale of the goods. The supplier is to furnish this office with proof of such expenses.

³ <http://www.cgso.org.za/wp-content/uploads/2015/12/CGSO-Advisory-Note-12-Cancellations-Revision1.pdf>

⁴ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1905452