IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

Case number: A499/2011

Date: 28 March 2013

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	
(3) REVISED	
....	
DATE	SIGNATURE

In the matter between:

BARKO FINANCIAL SERVICES (PTY) LIMITED	Appellant
and	
NATIONAL CREDIT REGULATOR	First Respondent
THE NATIONAL CONSUMER TRIBUNAL	Second Respondent

JUDGMENT

PRETORIUS J.

[1] This is an appeal against the decision of the National Consumer Tribunal, the second respondent. The appellant is appealing against the decision to set aside the compliance notice issued by the

respondent's regulation dated 24 June 2010. The appeal concerns the legality of fees paid to Altech NuPay in regards to services rendered by NuPay to consumers who have credit agreements with the appellant.

[2] The tribunal erred, according to the appellant, by finding that the NuPay Financial Services fees paid by consumers fall within the category of the National Credit Act and further that the service fees paid to NuPay by the consumers should be repaid by the appellant.

[3] The appellant is the credit provider and conducts short-term credit transactions with consumers. The provisions of the National Credit Act, 34 of 2005 ("the Act") apply to these transactions. As the appellant is a registered credit provider under the Act, the business activities are regulated by the National Credit Regulator (NCR).

[4] On 24 June 2010, after conducting an inspection of the applicant's business practices, compliance notice 359 was issued to the appellant in terms of section 55 of the Act by the first respondent. The complaint against the appellant was that the fees the consumer had to pay to NuPay are not recoverable by the appellant in terms of the Act. The appellant was instructed to reimburse the consumers by the amount that the consumers had paid fees to NuPay. The only fees the consumer can pay is stipulated in section 101(1) (b) to (g) of the Act.

[5] Section 101 (1)) of the Act provides:

"(1) A credit agreement must not require payment by the consumer of any money or other consideration, except-

(a) the principal debt, being the amount deferred in terms of the agreement, plus the value of any item contemplated in section 102;

(b) an initiation fee, which-

may not exceed the prescribed amount relative to the principal debt; and

must not be applied unless the application results in the establishment of a credit agreement with that consumer;

(c) a service fee, which-

in the case of a credit facility, may be payable monthly, annually, on a per transaction basis or on a combination of periodic and transaction basis; or

in any other case, may be payable monthly or annually; and

must not exceed the prescribed amount relative to the principal debt;"

[6] The prescribed amount in the present case is R50 per month per transaction.

[7] The modified compliance notice provides *inter alia*:

"...........Cease requiring consumers to pay the NuPay service provider fee where such fee, if added to the service fee charged by Barko, would increase the service fee payable under credit agreements to an amount above the prescribed maximum service fee of R50.00"

[8] A service fee is defined in section 1 of the Act as:

"A fee that may be charged periodically by a credit provider in connection with the routine administration cost of maintaining a credit agreement."

[9] The appellant had a separate agreement with NuPay to participate in the payment system, which is the "Service Level Agreement" ("SLA"). The SLA between the appellant and NuPay provides:

"MANAGEMENT SERVICES

The parties agree that NuPay shall provide the Management Services associated with the NuPay System to the Merchant, for ***which the latter shall pay NuPay the relevant fees as set out in clause 6 and Schedule A annexed hereto."*** (Court's emphasis)

[10] In clause 2.3.7.6 "Management Services" *inter alia* is defined as:

""Management Services" means and incorporates inter alia *the following services,*

2.3.7.1 ...

2.3.7.2 ...

2.3.7.3 ...

2.3.7.4 ...

2.3.7.5 ...

2.3.7.6 processing and management of transactions"

[11] This is exactly the same action that the consumer authorizes NuPay to do. NuPay must process and manage the transactions paid into the appellant's account by the consumer and the consumer has to pay the service fees to NuPay.

[12] Clause 7.2 of the SLA set out:

"The merchant will be required to sign the attached debit order form authorising NuPay to debit all the fees payable, on a monthly basis, as well as any other outstanding amounts owing to NuPay"

[13] There is no specific provision in the SLA to indicate which portion of the fee payable to NuPay must be paid by the consumer. The addendum of 29 April 2009 is between the appellant and NuPay and mentions a "service provider fee" which is processed with the consumer's obligation to the appellant as a single payment.

[14] The appellant relies on a separate agreement allegedly entered into between the consumer and NuPay which has no relationship to the

agreement between the appellant and the consumer. This agreement allows NuPay access to the consumers' bank account from which it deducts each instalment and pays the appellant.

[15] The argument by the appellant is that the NuPay Financial Service fee is a fee which may be recovered in terms of section 101 of the Act as the agreement between the consumer and NuPay was not part of the credit agreement between the appellant and the consumer. The fee is thus payable to NuPay. According to the appellant both amounts, that paid by the consumer to the appellant and the amount due to NuPay, are deposited by the consumer into the appellant's bank account. These financial service fees are due by the consumers to NuPay, according to the appellant. For purely practical reasons the consumer pays one amount into the appellant's account and does not have to pay the bank for two transactions, as NuPay sweeps the account for payment of their fees. The appellant's contention is that the NCR and the Tribunal erred in finding that the so-called NuPay financial services' fees paid by the consumers to NuPay fall within the category of capped National Credit Act fees. This amount may thus exceed the R50 cap as it was not a service fee, according to the appellant.

[16] The grounds of appeal is that the Tribunal erred in finding that the appellant induced consumers to enter into the NuPay service agreement; finding that the NuPay service agreement contained

unlawful provisions by providing for the levying of a service provider fee over the limit of R50 cap, which is unlawful under the Act; and finding that the provisions of section 124 of the Act do not assist the appellant.

[17] The appellant was according to the first respondent contravening the provisions of section 100 (1) (a) read with section 101 (1) of the Act and/or, contravening the provisions of section 100 (1) (b) read with section 101 (1) (c) and 105 (1) (b) and Regulation 44 of the Act; and/or charging an impermissible fee as contemplated in section 100 (1) (d) of the Act.

[18] Furthermore it is alleged that the appellant contravened section 90(1) read with section 90(2)(a) and (b) of the Act as, as well section 91(a) or (c) read with section 90(1), (2)(a) and (b) of the Act.

[19] The appellant argues that a consumer has a choice whether to enter into the NuPay agreement when entering into a credit agreement with the appellant. According to the appellant not all the consumers choose the NuPay option. Once a consumer has chosen the NuPay option it is beyond the control of the appellant, as it is a separate agreement between the consumer and NuPay. It is common cause that the NuPay agreement is concluded at the same time as the credit agreement with the appellant. The amount owed to NuPay is paid to the appellant and NuPay debits the appellant's account for this fee. The concession by the appellant that:

> *"Without prejudice to the rights of the applicant, it is accordingly submitted that although the loan documentation of the applicant may on the face of it create the impression that there has been non-compliance by the applicant with the cited provisions of the NCA, in reality these provisions have not been contravened."*

[20] The question must be posed as to why the appellant alleges it is reviewing its loan documentation and has requested NuPay to do the same; if the appellant is convinced that the agreements in both instances are presently in order.

[21] The appellant's counsel argues that if a consumer chooses not to enter into the NuPay agreement, it may go to the appellant's office and pay in cash. It is clear that the inference can be drawn that it was pointed out to the consumer that if they do not choose the NuPay option they will have to spend time and money to attend the appellant's office to make cash payment. This will be in contravention of section 71(a) of the NCA as it directly or indirectly induces the consumer to enter into the NuPay agreement.

[22] There is no mention or provision at all in the SLA that the consumers have to pay the appellant. It is patently clear that the appellant had relinquished its duty to collect the money to NuPay and that the consumer is not a party to the SLA.

[23] Section 101(1) of the Act does not make provision for the consumer to pay an additional service fee which would exceed the prescribed amount of R50. The appellant benefits from the services of NuPay in terms of the SLA and it is not the consumers that benefit from this arrangement, although the appellant argued that it was solely to benefit the consumer.

[24] The suit of documents provided to the consumer contains the NuPay agreement. The court has studied these documents and can come to no other conclusion, but that the credit agreement, the loan application agreements, and the copy of the quotation of the loan agreement and the NuPay Service Agreement all have the same style and font. The conclusion can only be that these documents emanate from the appellant. It must further be mentioned that the quotation and pre-loan agreement between the consumer and the appellant and the NuPay Service Agreement are both signed by the same person on behalf of the lender. There is no space on the so-called agreement between the consumer and NuPay for a representative of NuPay to sign the agreement.

[25] Clause 4 of the so-called NuPay agreement reads *inter alia:*

"The Consumer hereby authorise NuPay to process the Service Provider Fee due to NuPay and the Payment Obligation due to the Credit Provider as a single payment instruction and to deliver the payment instruction for collection at the Consumer's

> *bank. **The Consumer hereby authorises the Consumer's bank to debit the Consumer's nominated account with the amount of the payment instruction**...* " (Court's emphasis)

[26] There is no distinct separate agreement between the consumer and NuPay. The parties set out in the purported agreement are the consumer and the credit provider. There is no indication that a representative of NuPay is involved in the agreement at all. The appellant admits that there is no interaction between NuPay and the consumer when the agreement is concluded. It is clear that there is never any interaction between consumers and representatives of NuPay at all at any stage. The appellant conceded that 90% of the consumers use the NuPay system. There is no direct payment by the consumer to NuPay. The appellant pays NuPay after the appellant had collected the fee from the consumer which is paid into the appellant's bank account where NuPay collects it.

[27] The court must agree that, without the appellant's conclusion of the credit agreement with the consumer, the consumer would not have known about NuPay and would not have utilized the services of NuPay. The consumer would merely pay the amount into the account of the appellant without the intervention of NuPay and would not have to pay a service fee in addition to the amount according to the credit agreement.

[28] There is no reason offered as to why the consumer could not pay the appellant directly. The court has to come to the conclusion that an additional monetary liability is imposed on the consumer by the so-called agreement with NuPay and that section 100 (1) (d) is contravened in this regard by the appellant. The capped service fee of the appellant is R50, but in addition the consumer has to pay a monthly service fee to NuPay. The appellant contravenes section 90(2) of the Act by providing for an additional service fee and evading the provisions of section 101.

[29] Although the NuPay agreement does not form part of the loan agreement and would be unlawful if it had formed part of the agreement, it is still the appellant who introduces the consumers to the NuPay agreement and 90% of them choose to utilize the agreement. It is clear that it is the appellant's representative who discuss the advantages of the NuPay system with the consumers and not the representatives of NuPay. Therefore the appellant is guilty of contravention of section 91 read with section 91 (a), 101 (1) (d), 90(2)(e) and (f).

[30] It is quite clear that the consumer pays his money into the appellant's bank account that has control over the money. The fact that NuPay has a SLA with the appellant entitles NuPay to payment by the appellant. There is no *nexus* between the appellant and the consumer.

[31] The appellant, in the founding affidavit by Mr de Wet, in the objection to the Tribunal conceded:

> *"Notwithstanding the unfortunate wording of the credit agreement..."*

[32] It is quite clear that no representative of NuPay enters into a contract with a consumer. According to Mr De Wet:

> *"NuPay provides the applicant with electronic integration information that is sent to the applicant's computer programmer and then registered into way of a administrative computer programmes automatically calculates the value of the transaction and determines the service provider fee value as per agreement.* ***This information is then printed out on the NuPay Service Agreement which the consumer signs and in terms of the mandate contained therein the transaction is created on the AEDO system."*** (Court's emphasis)

[33] It is clear from the sample credit agreement and NuPay Service agreement, attached to Mr De Wet's affidavit, that both agreements were signed on 23 March 2010 by the same lender who had signed on behalf of NuPay, but only as a lender. There is no signature on the NuPay Service agreement by a representative of NuPay, although it is set out in clause 4 that the consumer is liable to NuPay.

[34] Section 3 of the NCA provides:

> *"3. Purpose of Act*
>
> *The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by-*
>
> *(a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions"*

[35] The actions by the appellant to induce the consumer to enter into a supplementary agreement with NuPay are inconsistent with a transparent credit market. It does not protect the consumers and is in violation of section 91 (a) of the Act.

[36] The appellant relies in the alternative on the provisions of section 124 of the Act. The court has studied the provisions of section 124(1)(a) of the Act and cannot find that the NuPay service fee constitutes a charge made against:

> *"(a) the charge or series of charges may be made only against an asset, account, or amount that has been-*
>
> *deposited by or for the benefit of the consumer and held by that credit provider or that third party; and*
>
> *specifically named by the consumer in the authorisation;"*

[37] Section 124(4) requires that the appellant must give the consumer notice:

> *"notice in the prescribed manner and form, setting out the particulars as required by this subsection, of the charge or charges to be made under that authorisation."*

[38] There is no evidence that the appellant ever complied with this provision. This argument by the appellant is thus rejected as there is no basis on the papers for such an argument.

[39] The appellant's counsel argued that the appellant cannot be expected to repay the amounts which had been paid by the consumer in respect of NuPay, as it was never paid as a result of an agreement between the appellant and the consumer. The consumer will have to claim it from NuPay as it was paid to NuPay. It is, however, common cause that the consumer made one payment in respect of NuPay and the appellant. Once the money is in the appellant's bank account it becomes the appellant's money and not NuPay's.

[40] It is quite clear that the consumers have signed an agreement with the appellant and not with NuPay. Therefore the appellant should be liable for the repayment of the amount paid over and above R50 per month by the consumer into the appellant's bank account. The appellant had to pay NuPay's service fee according to the SLA.

[41] In **Roestof v CliffeDekkerHofmeyer 2013 (1) SA 12 (GNP)** at paragraph 45 Du Plessis J held at paragraph 45:

> *"Geld (munte en note) is 'n roerende saak dus vatbaar vir eiendomsreg. Die eienaar van geld kan dit dus in beginsel met die* rei vindication *opeis van iemand wat in besit daarvan is. Omdat geld egter 'n vervangbare saak (*res funibiles*) is, is daar 'n komplikasie: Sodra 'n bepaalde eienaar se geld met iemand anders s'n vermeng word, kan dit prakties nie meer geïdentifiseer word nie en gaan die aanvanklike eienaar se eiendomsreg verlore. Geld, insluitende gesteelde geld, wat in 'n bankrekening inbetaal word, is geen uitsondering nie. Dit word deur regswerking die bank se eiendom. Gesteelde geld, munte en note, wat in 'n bankrekening inbetaal word kan dus nie deur die slagoffer met die* rei vindicatio *van die bank geeis word nie want hy is nie meer die eienaar daarvan nie. Vir dieselfde rede kan gesteelde geld wat aan 'n onskuldige derde betaal en met sy geld vermeng is, nie met die* rei vindicatio *van daardie derde opgeeis word nie."*

[42] The court finds that the Tribunal correctly found that the recovery of the NuPay service fees from the consumer is unlawful as

this action contravenes the provisions of the Act. The appellant should then be held liable to repay the consumers.

[43] Therefore the appeal cannot succeed on any of the grounds set out by the appellant.

It is ordered that:

1. The appeal is dismissed;
2. The appellant to pay the costs including the cost occasioned by the use of two counsel.

C Pretorius

Judge of the High Court

I agree,

LI Voster

Acting Judge of the High Court

I agree,

W Hughes

Acting Judge of the High Court

Case number	:	A499/2011
Heard on	:	13 February 2013
For the Appellant	:	Adv PF Louw SC
Instructed by	:	Routledge Modise Incorporated
For the Respondent	:	Adv C Loxton SC
	:	Adv PL Carstensen
Instructed by	:	Edward Nathan Sonnenberg INC
Date of Judgment	:	