IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: NCT/189544/2021/75(1)(b)

In the matter between:

MERLE BRANDON **APPLICANT**

and

CAPITEC BANK LIMITED **RESPONDENT**

Coram:

Mr T Bailey – Presiding Tribunal member

Dr L Best – Tribunal member

Adv N Sephoti – Tribunal member

Date of hearing – 10 May 2022 via the Microsoft Teams digital platform

Date of judgment – 4 June 2022

JUDGMENT AND REASONS

APPLICANT

1. The Applicant is Merle Brandon (the applicant). She is an adult female and a consumer who resides in Johannesburg, Gauteng.

2. The applicant represented herself. Her daughter, Julia Nel, assisted her at the hearing of this application.

RESPONDENT

3. The Respondent is Capitec Bank Limited (the respondent). It is registered and incorporated in terms of the company laws of the Republic of South Africa, with its principal place of business at 5 Neutron Street, Techno Park, Stellenbosch, Western Cape.

4. The respondent is an authorised financial services and registered credit provider to members of the public.

5. Advocate C Cilliers, an advocate of the Cape Bar, instructed by VanderSpuy Cape Town Attorneys, represented the respondent at the hearing of this application.

APPLICATION TYPE

6. The applicant makes this application in terms of section 75 (1) (b) of the Consumer Protection Act, 2008 (the CPA). That section provides that if the National Consumer Commission issues a notice of non-referral in response to a complaint, the complainant may refer the matter directly to the Tribunal, with leave of the Tribunal.

7. On 4 March 2022, the Tribunal granted the applicant leave to refer her complaint directly to the Tribunal. The Tribunal did so following the National Consumer Commission's notice of non-referral on 17 March 2021 because the applicant did not allege facts, if true, that would constitute grounds for a remedy under the CPA. The applicant's earlier complaint to the Banking Ombudsman had not resolved her dispute with the respondent.

TERMINOLOGY

8. A section in this judgment refers to a section in the CPA.

PROCEDURAL BACKGROUND

9. The applicant initially filed three separate founding affidavits. Those affidavits were, in effect, reduced to two affidavits dated 4 February 2021 (the first affidavit) and 15 April 2021 (the second affidavit). In October 2021, the respondent responded to both affidavits in its answering affidavit.

10. On 26 January 2022, the applicant deposed to a third affidavit, describing it as a 'revised combined affidavit'. She sought to file the third affidavit without suggesting it was a replying affidavit and without approaching the Tribunal to condone its late filing. Consequently, the third affidavit was not properly before the Tribunal, and the Tribunal does not rely on it.

FACTUAL BACKGROUND

11. The applicant concluded a savings account agreement with the respondent under savings account number 1219734800 (the applicant's account). On 5 March 2019, the applicant concluded a Remote Banking Agreement (the agreement) with the respondent that gave the applicant access to her banking accounts through an application loaded onto her cell phone (the App).

12. On 22 May 2020, the applicant's cell phone was stolen, including the App (the cell phone theft). She reported the theft to her service providers, who blocked the SIM card use. On 23 May 2022, she opened a case with the South African Police Service under case number 369/05/2020. The case is ongoing.

13. On 24 May 2020, she discovered that unknown persons had fraudulently withdrawn approximately R1.3 million from the applicant's account. At 18:35 that day, she reported the incident to the respondent. On 15 June 2020, she formally complained to the respondent about the unauthorised transactions.

14. The respondent investigated the complaint. On 25 June 2020, the respondent informed the applicant that it had established that she was a victim of Remote Banking fraud. This type of fraud only is committed when the applicant's confidential and personal information is divulged. The respondent could not be held liable for the loss. Unfortunately, by the time the respondent became aware of the fraud, the beneficiaries had used the funds from the applicant's account. Consequently, the respondent refused to refund the applicant the disputed amount of R1 065.590.

RELIEF SOUGHT

15. Although there is some uncertainty about the exact amount, the applicant requires the respondent to refund her the amount that unknown persons fraudulently withdrew from the applicant's account.

SUMMARY OF SUBMISSIONS

Applicant

16. The applicant submitted that she is a senior citizen with a grade 11 qualification. She has an "average man in the street" knowledge of banking law.

17. On 5 March 2019, she visited the respondent to obtain access to her banking accounts through an application loaded onto her cell phone. She concluded the agreement with the respondent. She visited the respondent for the same purpose again on 4 June 2019.

18. The respondent's consultant or staff member did not display the agreement to the applicant on a computer screen on either visit. Nor did they explain the agreement's terms to her when she signed them electronically. They did not draw her attention to clause 8.2 of the agreement indemnifying the respondent from liability until she notified them to suspend her Remote Banking access due to transactions performed on the applicant's account without her knowledge or consent. Nor did they inform her of her duty in clause 11.1 to report her Remote Banking use irregularities. So too, to inform her how she could comply with clause 12.2, requiring her to immediately inform the respondent that a suspicious transaction had occurred if she did not have the "communication means" to do so.

19. The applicant never disclosed her password or PIN to anyone. She believed the respondent contravened the CPA because the agreement, containing over 8000 words, did not provide information in plain and understandable language, was ambiguous and used unreasonable terms.

Respondent

20. The respondent's Legal Adviser: Risk Management, Lemuel Mokena, submitted that in concluding the agreement with the applicant, it drew her attention to specific clauses in the agreement. Those clauses appear in bold under the heading *Consumer Protection Act (CPA)*. Those clauses concern limiting the respondent's risks and liability to the applicant and other parties, where the applicant assumes certain risks and liabilities, the applicant's responsibility to indemnify the respondent in certain circumstances and where she acknowledged awareness of some facts regarding Remote

Banking.

21. By affixing her handwritten signature to the agreement, the applicant certified that the printout correctly reflected the agreement the consultant had displayed to her on a computer screen. She accepted by affixing her electronic signature, the consultant printed it out immediately after the consultant displayed it to her, allowed her to read it, and explained it to her.

22. Similarly, the consultant who assisted the applicant declared that by affixing her handwritten signature on the agreement, the printout correctly reflected the agreement she displayed to the applicant on a computer screen. So too, by affixing her electronic signature, the applicant accepted the consultant had printed out the agreement immediately after the consultant displayed it to her, allowed her to read it, and explained it to her.

23. The respondent denied breaching the CPA. The agreement meets the CPA's plain language requirements. The applicant did not state the facts to support her contention that the agreement was ambiguous and used unreasonable terms.

ANALYSIS OF THE MERITS

Introduction

24. The Tribunal conducts its analysis against the backdrop that Parliament introduced the CPA into the South African consumer landscape to promote consumers' social and economic welfare. The CPA has established a legal framework to achieve and maintain, amongst other things, a fair and efficient consumer market responsible for the benefit of consumers.[1] In realising consumer rights, the Tribunal or a court must develop the common law and promote the spirit and purpose of the CPA. It must also make appropriate orders to affect a consumer's right to access redress.[2]

Discussion

25. The applicant bears the onus of discharging on a balance of probabilities that the respondent

[1] Section 3 (1) (a) of the CPA.
[2] Section 4 (2) of the CPA.

committed prohibited conduct,[3] and she is entitled to the relief she seeks in this application.

26. Factually, there were two strings to the applicant's bow. The Tribunal considers each in turn.

The first string: the applicant's awareness of the notification clauses

27. The applicant alleged that she was unaware of the notification clauses that she had to report the cell phone theft to the respondent because it did not positively alert her of her contractual duty to do so. The respondent vehemently denied the allegation resulting in a direct and material dispute of fact.

28. In these proceedings, in which the applicant seeks final rather than interim relief, the so-called *Plascon-Evans* rule applies.[4] The rule holds that when factual disputes arise in circumstances where the applicant seeks final relief, the relief should be granted in favour of the applicant only if the facts the respondent alleged in its answering affidavit justify the order requested. The rule also allows the courts, in certain circumstances, to determine disputes of fact in application proceedings without hearing oral evidence and on the respondent's written version of events.

29. In the Tribunal's view, the respondent was correct to point out that the applicant's reliance on the respondent's alleged failure to notify her was a red herring. Clause 11.1 of the agreement can be no more clear. It requires the applicant to report any irregularities concerning her Remote Banking use, including compromising a Password, temporary PIN or Remote PIN or relevant confirmation message responses.

30. In clause 8.2, the applicant indemnified the respondent from any losses she may suffer until she notified the respondent to suspend her Remote Banking access. On the applicant's version, she only reported the cell phone theft to the respondent after the unauthorised transactions occurred. In addition, the applicant acknowledged in clause 5.5 that the respondent was entitled to assume that she was accessing the App and approve the transaction each time the App was used. She failed to make a case that the respondent had a duty to have picked up the fraud. Consequently, the *Plascon-Evans* rule applies in the respondent's favour.

[3] The CPA defines 'prohibited conduct' to mean an act or omission in contravention of the CPA.
[4] *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623.

The second string: whether the applicant divulged her password or PIN

31. The applicant alleged that she never disclosed her password or PIN to anyone. In its letter to the applicant, dated 25 June 2020, the respondent recorded that this type of fraud is committed only when the applicant's confidential and personal information is divulged.

32. The applicant did not suggest that the respondent divulged her password. Ultimately, all the Tribunal is left with is that the fraudsters must somehow have obtained her password or PIN due to the applicant inadvertently allowing the cell phone to fall into the hands of strangers. Consequently, the *Plascon-Evans* rule once again applies in the respondent's favour.

Caveat subscriptor

33. The applicant did not dispute that she electronically signed the agreement. Section 50 (2) (a) provides that a written consumer agreement between a supplier and a consumer applies irrespective of whether the consumer signs it. The principle of *caveat subscriptor*, which means let the signatory beware, binds the applicant. A person who signs a contract signifies consent to the contents even if they have not read it.[5] If the contents subsequently turn out unfavourably, there is no one to blame but him or herself,[6] which is precisely what happened in the present case. The respondent was reasonably entitled to assume that the applicant, when signing the agreement, signified her intention to be bound by it.

34. Moreover, South African law does not recognise a general duty to draw a signatory's attention to the contents or a portion of a document before signing it. Such an approach would introduce an inappropriate "degree of paternalism" into the law.[7] In the absence of a statutory provision to the contrary, a signatory who signs a document without reading it can only escape liability if the document contains a term that a reasonable person would not expect to find in the document they signed. In this case, the applicable term is clause 11.1. As appears later, the Tribunal is satisfied that clause 11.1 is eminently reasonable and fair. The respondent was correct to point out that Internet banking would not be a feasible activity without it.

[5] *First Rand Bank Limited v Coningsby and Another* [2021] ZAGPJHC 744 para 21.
[6] GP Bradfield's Christie's Law of Contract in South Africa, LexisNexis 7th ed para 5.3.1.
[7] *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* 2007 (2) 599 (SCA) para [9].

CONTRAVENTIONS OF THE NCA

35. The applicant submitted that the respondent had violated sections 22 (1) (b), 40 (1) (b) and 48. The Tribunal considers each in turn

Section 22: Right to information in plain and understandable language

36. The applicant believed the respondent contravened section 22 because the agreement does not provide information in plain and understandable language.

37. Section 22 (1) (b) requires a document provided to a consumer to be in plain and understandable language. Section 22 (2) provides that a document is in plain language if it is reasonable to conclude that the ordinary consumer with average literacy skills and minimal consumer experience of the services could be expected to understand the document's content without undue effort. Considerations such as the context, comprehensiveness, organisation, form, style, vocabulary, sentence structure, and use of headings or other aids to reading and understanding determine whether the document is in plain language.

38. The applicant's reliance on section 22 amounted to no more than a bald allegation. She did not provide supporting facts or provide a basis to conclude why the agreement did not meet the considerations. Nothing in the three clauses concerning the notification requirement persuades the Tribunal that the applicant could not be expected to understand them. In addition, the words "without undue effort" in section 22 (2) recognise the legitimate act of the consumer reading the agreement or making some effort to understand it.

39. The respondent was also correct to point out that the applicant's later complaint that the agreement was too long indicates an unwillingness to make an effort to read it rather than an inability to understand it, particularly since the theft occurred more than a year after she concluded the agreement. Moreover, the applicant acted somewhat disingenuously by raising the plain language complaint when it transpired that she did not read the agreement.

40. Consequently, her reliance on section 22 must fail.

Section 41: False, misleading or deceptive representations

41. The Tribunal agrees with the respondent's assertion that the applicant's reliance on section 41 (1) (b) is flawed. That section provides that when marketing services, the supplier must not use exaggeration, innuendo or ambiguity concerning a material fact or fail to disclose a material fact if that failure amounts to deception.

42. The applicant alleged that the respondent relied on ambiguity in the agreement and failed to disclose a material fact requiring the consumer to notify the respondent immediately of the cell phone theft. Once again, she provided no supporting facts concerning the agreement's ambiguity. She did not identify the words she alleged were ambiguous. Nor did she explain their ambiguity. Furthermore, the Tribunal agrees with the respondent that the supposed ambiguity in the agreement plays no role where the applicant's actual complaint is not about the meaning of the relevant requirements but that she was not initially aware of them. She also did not adduce evidence showing deception.

43. Consequently, her reliance on section 41 (1) (b) must fail.

Section 48: Unfair, unreasonable or unjust contract terms

44. The applicant's third complaint was that the agreement used unreasonable terms as contemplated broadly in section 48. Section 48 (1) (a) provides that a supplier must not offer to conclude an agreement to supply goods or services at a price and on unfair, unreasonable or unjust terms. Subsection (2) provides that the agreement is unfair, unreasonable or unjust if it is excessively one-sided in favour of a person other than the consumer or is inequitable. Alternatively, the consumer relied upon a false, misleading or deceptive representation or the agreement was subject to a condition that is unfair, unreasonable, unjust or unconscionable.

45. The applicant alleged that the agreement was unduly long, containing over 8000 words. Its length exceeded what "any man" in the street could possibly remember. The agreement did not cover the possibility that a consumer may not be able to notify the respondent of a stolen cell phone because they would not have the stolen cell phone or an alternative telephone device. Also, restricted operating hours prevented visiting one of the respondent branches.

46. In the Tribunal's view, the applicant's reliance on section 48 does not help her cause. There is nothing in section 48 governing the length of a document to render it unfair, unreasonable or unjust. The core concept of unfairness used in section 48 is something that is "exploitative of the consumer" and so "blatantly unreasonable", rendering it contrary to public policy.[8]

47. The notification requirement is not exploitative of the consumer and blatantly unreasonable. It aims to protect both the respondent and the applicant, particularly her money. It is only reasonable that consumers should do everything possible to notify the banks of events that may put the security of their accounts at risk. The applicant blocked her cell phone and cancelled the SIM card. She failed to inform the respondent immediately and, therefore, denied it the opportunity to take the necessary steps to prevent fraudulent activity.

48. The respondent was correct to point out that the notion that the consumer must "remember" all the agreement details is unrealistic. There was no indication that the respondent required the applicant to do so on the papers. However, it is not unrealistic to expect the consumer to remember the agreement's essential provisions. In the present case, the Tribunal agrees with the respondent that provisions concerning account security, safeguarding one's cell phone and notifying the respondent if it is lost or stolen fall into the latter category. At the very least, it is a commonsense approach expected of the ordinary person in the street who has a banking app on their cell phone. Even more so, in the present case, given the amount that lay in the applicant's account.

49. Ultimately, the Tribunal is left with the impression that the applicant did not believe it necessary to contact the respondent because she had blocked her cell phone. Alternatively, she did not think through all the steps she needed to take to preserve the funds in her account. Moreover, the applicant failed to adduce evidence concerning the applicant's operating hours that prevented her from visiting one of the respondent branches. The Tribunal places no reliance on it.

50. Consequently, the applicant's reliance on section 48 must fail.

CONCLUSION

51. The applicant failed to discharge the onus that the respondent committed prohibited conduct within

[8] *Magic Vending (Pty) Ltd v Tambwe and Others* [2020] ZAWCHC 175; 2021 (2) SA 512 (WCC) paras 7 and 8.

sections 22, 41(1)(b) and 48 and is not entitled to the relief she seeks in this application.

ORDER

52. Accordingly, the Tribunal makes the following order:

52.1. The application is refused; and

52.2. There is no cost order.

TREVOR BAILEY

PRESIDING MEMBER

Tribunal members Dr L Best and Adv N Sephoti concur with this judgment.

Authorised for issue by The National Consumer Tribunal

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