

**IN THE KWAZULU NATAL CONSUMER TRIBUNAL
HELD IN STANGER**

Case Number: KZNCT17/2022

In the matter between:

KWAZULU NATAL CONSUMER PROTECTOR

FIRST PLAINTIFF

MLONDOLOZI DLAMINI

SECOND PLAINTIFF

(Name of the Consumer)

and

JATRU TRADING (PTY)LTD t/a TRUCKING TRADERS

RESPONDENT

Coram:

Prof B. Dumisa – Chairperson & Presiding Member

Ms P. Dabideen – Member

Ms A Sewpersad – Member

Date of Hearing – 21 February 2023

Date of Judgment – 08 March 2023

JUDGEMENT AND REASONS

PLAINTIFFS

FIRST PLAINTIFF

1. The First Plaintiff in this matter is the **OFFICE OF THE KWAZULU NATAL CONSUMER PROTECTOR**, established in terms of Section 5 of the KwaZulu Natal Consumer Protector Act 04 of 2013 (the "Act") (hereinafter referred to as "the First Plaintiff"), with Head Offices at 270 Jabu Ndlovu Street, Pietermaritzburg, in the Province of KwaZulu-Natal.

2. The Office of the KwaZulu-Natal Consumer Protector falls under the Department of Economic Development, Tourism and Environmental Affairs (EDTEA) in the Province of KwaZulu-Natal.
3. At the hearing, the First Plaintiff was represented by Mr R Moodley, the Deputy Director in the Office of the Consumer Protector KwaZulu-Natal, in the employ of the First Plaintiff.
4. The First Plaintiffs Investigation Report was deposed to by Mr Kenneth Sibusiso Ngubo, an Assistant Director, an Investigator within the Office of the KwaZulu-Natal Consumer Protector, at its Head Offices at 270 Jabu Ndlovu Street, Pietermaritzburg, in the Province of KwaZulu-Natal.

SECOND PLAINTIFF

5. The Consumer, who is the Second Plaintiff in this matter is Mr **MLONDOLOZI DLAMINI**, a major male, who resides in Glenhills Drive, KwaDukuza, in the Province of KwaZulu-Natal (hereinafter referred to as "the Second Plaintiff" or "the Consumer").
6. The Second Plaintiff lodged his complaint against the Respondent on the 27th of October 2022.
7. At the hearing, the Second Plaintiff represented himself.

RESPONDENT

8. The Respondent is **JATRU TRADING (PTY) LTD t/a TRUCKING TRADERS BALLITO**, with its principal place of business situated at 221 Simbithi Office Park, Shaka's Rock, Dolphin Coast, which address it has chosen as its domicilium citandi et executandi (hereinafter referred to as "the Respondent").
9. The Respondent did not attend despite being properly notified to attend the hearing. The Tribunal was satisfied that the Respondent was aware of the matter proceeding and that it was entitled to proceed with the matter and hence the matter was heard by default.

APPLICATION TYPE AND ORDER SOUGHT

10. This KZN Consumer Tribunal (hereinafter referred to as “the Tribunal) derives the jurisdiction for hearing this matter under Sections 10 and 21 of the KwaZulu-Natal Consumer Protection Act, 4 of 2013 (the KZNCPA). This matter is in terms of Section 4(5)(a), Section 15, Section 54(1) and Section 65(2)(b) and (c), of the Consumer Protection Act No 68 of 2008 (the CPA).
11. The Second Plaintiff sought an order against the Respondent in the following terms:
 - 11.1 Confirmation of the termination of the Agreement.
 - 11.2 Declaring that the Respondent's conduct is prohibited conduct, in contravention of Section 41 read with Section 51, Section 55(2)(a), Section 55(3), and Section 56(2) of the Consumer Protection Act 68 of 2008 (the “CPA”);
 - 11.3 Directing the Respondent to refund the Second Plaintiff the full amount of R200 000.00 (Two Hundred Thousand Rand) being the total amount paid by the Second Plaintiff to the Defendant for the truck;
 - 11.4 Directing the Defendant to pay interest rate tempore morae;
 - 11.5 Directing the Defendant to pay an administrative penalty within the discretion of the KwaZulu-Natal Consumer Tribunal; and
 - 11.5 Any further and/or alternate relief.

MATTERS TO BE DECIDED

12. The Tribunal has to decide whether:

12.1 The Defendant breached the provisions of the Act as alleged; and

12.2 The appropriate relief to be granted.

BACKGROUND

13. The Second Plaintiff submitted as follows:

13.1 The Second Plaintiff was intent on purchasing a 4 ton truck, for business purposes;

13.2 The Second Plaintiff's diligent search for a 4 ton truck led him to the Defendant's business through an advert which he found on social media, on Facebook to be exact;

13.3 The Second Plaintiff contacted the Defendant, making his intentions clear from the onset that he wanted to buy a 4-ton truck for business purposes. An appointment was set up for the Second Plaintiff to meet with the Defendant's representative, namely, Greg Bowles, on the 8th of June 2022, at the Defendant's business premises at Trucking Traders Ballito, in Ballito, KwaZulu-Natal;

13.4 At the said meeting, the Second Plaintiff was advised to look at the trucks on display for sale by the Defendant. Greg Bowles assured the Second Plaintiff that all trucks on display were 4 ton trucks. The Second Plaintiff showed interest in a 2012 Hyundai H65 Drop side model, after seeing several other trucks. Again, Greg Bowles reassured the Second Plaintiff that this Hyundai was a 4-ton truck;

13.5 Seeing that the Second Plaintiff was interested in this Hyundai truck, Greg Bowles convinced him to urgently pay for the truck, purportedly because of the high demand.

13.6 Wholly based on the repeated assurances and representations made by Greg Bowles that the Hyundai truck was a 4 ton truck, the Second Plaintiff entered into a transaction with the Defendant and immediately paid an amount of R200 000.00 (Two Hundred Thousand Rand).

- 13.7 On the 13th of June 2022, Greg Bowles informed the Second Plaintiff that the truck was ready for collection. Upon collection the Second Plaintiff realized that the truck he bought was not a 4-ton truck, but was actually a 2.5 ton truck. The Second Plaintiff was made aware that the truck he purchased was actually a 2.5 ton truck after his friend who accompanied him to collect the truck had physically measured the truck and discovered that it was actually a 2.5 ton truck and not the 4 ton truck that Greg Bowles had repeatedly misrepresented as a 4 ton truck.
- 13.8 Greg Bowles was present when the Second Plaintiff's friend discovered that the truck which the Second Plaintiff had already paid for was actually a 2.5 ton truck, and not a 4 ton truck as repeatedly indicated by Greg Bowles..
- 13.9 Greg Bowles immediately conceded that *"he had mistakenly indicated that it was a 4 ton truck"*. He immediately cancelled the purchase agreement, and willingly undertook to refund the following day.
THAT IS THE DEFENDANT'S UNDERTAKING THAT HAS NOT BEEN HONoured TO THIS DATE.
- 13.10 On the 24th of June 2022 the Second Plaintiff lodged a complaint with the Motor Industry Ombudsman of South Africa (MIOSA) against the Respondent. The MIOSA investigated the matter in terms of Section 55 of the CPA, which provides that every consumer has a right to receive goods that are reasonably suitable for the purposes for which they are generally intended. After doing their own investigations MIOSA arrived at the following conclusions:
- 13.10.1 MIOSA assessed the submissions of both the parties and commended that as per the purchase invoice, the vehicle was represented as a 4 ton truck which the Defendant confirmed was a mistake on his part;
- 13.10.2 The invoice indicates that the truck was sold by Defendant to the complainant (the Second Plaintiff); and nowhere does the invoice state that this was the consignment goods or sold on behalf of a third party; hence, for all the intents and purposes the Second Plaintiff reasonably he was buying a 4 ton truck, which the Defendant now wants people to believe was not the case;

13.10.3 The Defendant asserts that it was only when they realized that the truck which had been sold was actually a 2.5 ton truck, and not the 4 ton truck they believed it was, that they decided to immediately cancel the purchase agreement;

13.10.4 Greg Bowles had promised to refund the Second Plaintiff the following day after the cancellation of the purchase agreement, which he failed to do so. MIOSA concluded that the condition imposed by the Defendant that they would first need to be refunded by the previous owner for them to refund the complainant was thus unacceptable;

13.10.5 On 6 September 2022, MIOSA recommended that the Defendant must refund to the Second Plaintiff the full purchase price; and that this was to be finalized in fifteen (15) business days from the date of the MIOSA correspondence indicating their recommendations for a total refund; and

13.10.6 The Respondent simply ignored the recommendations of MIOSA and continues to do so.

13.10.7 On the 16th of November 2022, the Defendant provided a written response acknowledging their indebtedness to the Second Plaintiff but still failed to honour his promises to refund the Second Plaintiff.

13.11 On the 25th of October 2022, the Second Plaintiff finally decided to officially lodge this complaint with the First Plaintiff.

THE FIRST PLAINTIFF'S EFFORTS TO RESOLVE THIS COMPLAINT

14. The First Plaintiff submitted that all attempts to resolve this complaint amicably had failed:

14.1 The Respondent failed to cooperate with the First Plaintiff, in the same way as they failed to adhere to the MIOSA recommendations.

- 14.2 Based on the Respondent's failure to co-operate with the First Plaintiff, the latter decided to refer this matter to the KZN Consumer Tribunal for adjudication.

THE HEARING

15. The hearing was held on 21 February 2023
- 15.1 The Hearing was held at the KwaDukuza District Offices of the KwaZulu-Natal Department of Economic Development Tourism and Environmental Affairs (EDTEA).
- 15.2 The Respondent had not formally indicated their intention to defend the matter, nor did they attend the hearing.
- 15.3 At the hearing, the First Plaintiff and the Second Plaintiff confirmed the details of the complaint as contained under Background above.

APPLICABLE SECTIONS OF THE CONSUMER PROTECTION ACT 68 of 2008

16. Section 41

False, misleading or deceptive representations

“(1) In relation to the marketing of any goods or services, the supplier must not, by words or conduct –

- (a) directly or indirectly express or imply a false, misleading or deceptive representation concerning a material fact to the consumer*

17. Section 51

Prohibited transactions, agreements, terms or conditions.

(1) 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.*
- (ii) mislead or deceive the consumer; or*
- (iii) subject the consumer to fraudulent conduct.*

18. Section 55

Consumer's rights to safe, good quality

- (1) ...
- (2) *Except to the extent contemplated in subsection (6), every consumer has a right to receive goods that -*
- (a) are reasonably suitable for the purposes for which they are generally intended;*
 - (b) are of good quality, in good working order and free of any defects;*
 - (c) will be usable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply; and*
 - (d) comply with any applicable standards set under the Standards Act, 1993 (Act 29 of 1993), or any other public regulation.*
- (3) *In addition to the right set out in subsection (2)(a), if a consumer has specifically informed the supplier of the particular purpose for which the consumer wishes to acquire any goods, or the use to which the consumer wishes intends to apply those goods, and the supplier –*
- (a) ordinarily offers to supply such goods; or*
 - (b) acts in a manner consistent with being knowledgeable about the use of those goods, the consumer has a right to expect that the goods are reasonably suitable for the specific purpose that the consumer has indicated.*

19. Section 56

Implied Warranty of Quality

- (1) ...
- (2) *Within six months after the delivery of any goods to a consumer, the consumer may return the goods to the supplier, without any penalty and at the supplier's risk and expense, if the goods fail to satisfy the requirements and standards contemplated in section 55, and the supplier must, at the direction of the consumer, either -*
- (a) repair or replace the failed, unsafe or defective goods; or*
 - (b) refund to the consumer the price paid by the consumer for the goods.*

CONSIDERATION OF THE EVIDENCE BEFORE THE TRIBUNAL

20. It is not in dispute that the Defendant, at all material times, misrepresented the 2.5-ton truck that he sold to the Second Plaintiff as a 4-ton truck.
- 20.1 It was solely based on these repeated misrepresentations that the Second Plaintiff entered into a purchase agreement with the Defendant;
- 20.2 Once confronted with the truth that the 2.5 ton truck was a 4 ton truck, the Defendant quickly conceded "it was a mistake on his part" , and immediately cancelled the purchase agreement;
- 20.3 The Defendant then offered to fully refund the Second Plaintiff, on more than one occasion, but never honoured his promises.
21. The Defendant totally ignored the recommendations of MIOSA that the Second Plaintiff to be fully refunded the total purchase price.
22. The Defendant equally ignored and frustrated the First Plaintiff's efforts to amicably mediate this matter.
23. The Second Plaintiff also instructed a firm of attorneys Gina Mtengu & Company who served the Defendant with a Letter of Demand, which was equally ignored by the Defendant.
24. The Second Plaintiff purchased the truck in an effort to expand into the delivery sector of the hardware business to earn an income and as a consequence of the delay in refunding his money the Second Plaintiff lost the contract .The Second Plaintiff made payment of the R200 000,00 to the Defendant on the 8th June 2022 and almost 9 months later the Second Plaintiff is still out of pocket through no fault of his own .

25. It was only after having exhausted all the avenues above, that the Second Plaintiff's case was finally escalated to the Tribunal for a hearing.

CONSIDERATION OF THE ORDERS APPLIED FOR

26. The Second Plaintiff prayed for the confirmation of the termination of the Purchase Agreement; this was never disputed by the Defendant.

27. There was a prayer for the Respondent's conduct to be declared prohibited conduct in contravention of various provisions of the CPA.

27.1 The advertisements by the Defendant on social media were misleading, and his subsequent repeated false misrepresentations about a 2.5 ton truck being a 4 ton truck were definitely in breach of the section 41 provisions against false, misleading or deceptive representations;

27.2 The Defendant's position that he would only refund the Second Plaintiff's amount of R200 000.00 once he has been able to sell this truck or once he had made some arrangements with the person he bought this truck from is totally unacceptable, as his (the Second Plaintiff's) payment of R200 000.00 was in no way linked to all these excuses that the Defendant is raising, somehow implying that this was a consignment sale. This is definitely in breach of Section 51 provisions.

27.3 When the Respondent refused to cooperate with the First Plaintiff, and also refused to implement the recommendations of MIOSA, their behaviour was deliberately calculated to frustrate or defeat the purposes and policy of the CPA, namely, the realization of consumer rights. This was in contravention of Section 4(5)(a) of the CPA. The First Plaintiff in his closing submissions brought to the attention of the Tribunal how Nthambeleni AJ, in the Gauteng Division, Pretoria, Case 47933/17 Barnado v the National Consumer Commission and others, where the Defendant had failed to comply with the recommendations of MIOSA, as it is unfortunately a common practice for suppliers of goods (cars) to just ignore the

recommendations of MIOSA. On Paragraph 38 of this judgment Nthambeleni AJ aptly wrote *“The terms of the recommendations were clear that the matter should be resolved in terms of Section 56 of the CPA, read together with Section 20 of the Act. In terms of the order the third respondent should have refunded the purchase price to the applicant less any amounts necessary to render the vehicle for re-stocking and the costs of usage thereof. There was non-compliance with the recommendations issued against the third respondents. There are no reasons advanced on papers before Court why there was non compliance and the only reasonable inference to be drawn from the conduct of the third respondent is that it is contemptuous disregard of the recommendations, and such conduct is tantamount to prohibited conduct as envisaged in the CPA”; and*

27.4 In this particular case of Mlondolozzi Dlamini v Jatru Trading (Pty) Ltd t/a Trucking Traders Ballito, the Defendant was equally very contemptuous of MIOSA and everyone else. This Tribunal has a duty to send a stern warning to all car dealerships and other role players in the car industry to begin to seriously comply with MIOSA's recommendations, except where there are reasonable grounds for formally challenging such MIOSA recommendation. It is on these grounds that this Tribunal considers the Defendant's contemptuous attitude towards MIOSA one of the grounds for declaring them to have committed prohibited conduct in contravention of various provisions of the CPA.

28. The First Plaintiff asked that the Defendant refund to the Second Plaintiff the total purchase price of R200 000.00 (TWO HUNDRED THOUSAND RAND ONLY). This is a reasonable request, as the Defendant has been unjustly enriched by the Second Plaintiff's money for no goods being delivered.

29. The First Plaintiff motivated for the imposition of the administrative fine, arguing it will serve a twofold purpose:

29.1 to deter the Defendant from engaging in further prohibited conduct; and

29.2 to prevent other dealerships within the motor industry from engaging in similar conduct.

ORDER

Accordingly, the Tribunal makes the following order:

30. The Respondent is declared to have engaged in prohibited conduct in contravening Section 41 read with Section 51, Section 55(2)(a), Section 55(3), and Section 56(2) of the Consumer Protection Act No 68 of 2008;
31. The Defendant is ordered to refund the Second Plaintiff the full purchase price of R200 0000.00 (TWO HUNDRED THOUSAND RAND ONLY);
32. The Defendant is ordered to pay interest on the amount of R200 000.00 at the prescribed rate tempore morae.
33. The Defendant is ordered to pay an administrative penalty of R250 000.00 (Two Hundred And Fifty Thousand Rand only) to the bank account of the KwaZulu-Natal Provincial Revenue Fund: Banking Details are as follows:

BANK NAME: ABSA

ACCOUNT NAME : KZN PROV GOV- TREASURY

ACCOUNT TYPE: CHEQUE ACCOUNT

ACCOUNT NUMBER: 40 7248 4412

BRANCH NAME : ABSA BUSINESS CENTRE – KZN

BRANCH CODE: 630495

Reference : KZNCT17/2022 and Name of Person or Business making payment

34. The total amounts are payable within 60 (SIXTY) days of the date of this judgment.

35. There is no order as to costs.

DATED ON THIS 13th DAY OF MARCH 2023

A handwritten signature in dark ink, consisting of a large, sweeping loop followed by a smaller, more intricate flourish.

Prof B. Dumisa
Chairperson

Ms. A. Sewpersad (Member and Alternate Deputy Chairperson) and Mrs. P. Dabideen (Member) concurred.