

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

**Case Number: KZNCT01/2021**

In the matter between:

**KWAZULU NATAL CONSUMER PROTECTOR**

**FIRST PLAINTIFF**

**NONHLANHLA BUTHELEZI**

**SECOND PLAINTIFF**

**(Name of the Consumer)**

and

**JS PROJECTS AND CIVILS CC**

**RESPONDENT**

Coram:

Prof B. Dumisa – Chairperson & Presiding Member

Ms P. Dabideen – Member

Ms P Ndlovu – Member

Date of Hearing – 04 April 2022

Date of Judgment – 27 April 2022

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**JUDGEMENT AND REASONS**

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**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 is deposed to by Mr. V Dlamini, Assistant Director for Consumer Protection Services in the employ of the First Plaintiff.

## **SECOND PLAINTIFF**

5. The Consumer, who is the Second Plaintiff in this matter is **NONHLANHLA BUTHELEZI**, a major female, who resides in Durban, in the Province of KwaZulu-Natal (hereinafter referred to as “the Second Plaintiff” or “the Consumer”).
6. The Second Plaintiff lodged her complaint against the Respondent on the 10<sup>th</sup> of May 2021.
7. At the hearing, the Second Plaintiff represented herself.

## **RESPONDENT**

8. The Respondent is **JS PROJECTS AND CIVILS CC**, a close corporation duly incorporated and registered in terms of the Close Corporation Act 64 of 1984 of the Republic of South Africa, with registration number 2011/033671/23, with its principal place of business situated at 30 Falcon Road, Duffs Road, Avoca, Durban, which address it has chosen as its domicilium citandi et executandi (hereinafter referred to as “the Respondent”).
9. The Respondent was represented by its sole member, Mr **MICHAEL MPENDULO JOJO**.

## **APPLICATION TYPE AND ORDER SOUGHT**

10. This KZN Consumer Tribunal (hereinafter referred to as “the Tribunal”) derives the jurisdiction for hearing this matter under Section 21 of the KwaZulu-Natal Consumer Protection Act, 4 of 2013 (the KZNCPA).

This matter is in terms of Section 19(2)(a)(i) and Section 47(3) of the Consumer Protection Act No 68 of 2008 (the CPA).

11. The Second Plaintiff sought an order against the Respondent in the following manner:
  - 11.1 Confirmation of termination of the Agreement;
  - 11.2 Refund the Second Plaintiff the amount of R103 000.00 (ONE HUNDRED AND THREE THOUSAND RAND) already paid to the Respondent;
  - 11.3 Interest at the prescribed rate tempore morae;
  - 11.4 The Respondent's conduct to be declared as prohibited conduct in contravention of Section 19(2)(a)(i) and Section 47(3) of the CPA; and
  - 11.5 Any further and/or alternate relief.

## **MATTERS TO BE DECIDED**

12. The Tribunal has to decide whether:
  - 12.1 The Respondent breached the provisions of the Act as alleged; and
  - 12.2 The appropriate sanction.

## **BACKGROUND**

13. The Second Plaintiff gave the following details when she lodged her complaint against the Respondent with the First Plaintiff. See Exhibit 1
  - 13.1 The Respondent approached the Second Plaintiff to build for her, when he noticed that they were planning to build a double garage and the extension of the lounge area.

- 13.2 The Respondent gave the Second Plaintiff the quotation, dated 24 January 2020. See Exhibit 2
- 13.3 The quotation was for R146 355.99 (ONE HUNDRED AND FORTY-SIX THOUSAND THREE HUNDRED AND FIFTY FIVE THOUSAND RAND AND NINETY-NINE CENTS) (excluding 15% VAT).
- 13.4 The duration of the Works was going to be 2 months based on the availability of material on site.
- 13.5 The Second Plaintiff was expected to pay a deposit of 70 percent before the start of the project.
- 13.6 Before the Second Plaintiff could pay the deposit, the Respondent asked the Second Plaintiff for an amount of R1 500.00 (ONE THOUSAND FIVE HUNDRED RAND) for some unclear sundry expenses. The Second Plaintiff paid this amount on 21 January 2020. See Exhibit 3
- 13.7 The Second Plaintiff paid the Respondent the deposit of R103 000.00 (ONE HUNDRED AND THREE THOUSAND RAND), which is just more than the required 70 percent, on 30 January 2020. See Exhibit 3
- 13.8 In February 2020 the Respondent started with the trenches, and soon disappeared.
- 13.9 When the Respondent had disappeared without explaining anything to the Second Plaintiff, the latter called the Respondent who assured her that he was waiting for the cement in the trenches to dry before can start with building.
- 13.10 The Respondent did not come back in February and March 2020.
- 13.11 South Africa was placed under the Disaster Management Act measures and later under the National Lockdown during the period the Respondent had disappeared.
- 13.12 The Respondent thereafter said he would recommence with the building once the building industry was allowed to operate again.

- 13.13 A trail of emails sent to the Respondent by the Second Plaintiff in 2020 and in 2021 does show that the latter was persistent in trying to get the former to deliver on his contractual obligations, which the Respondent simply did not pay any attention to.
- 13.14 According to the Second Plaintiff, the Respondent sometimes just ignored any correspondence and /or telephone calls from the Second Plaintiff; and the Respondent would sometimes make promises to come back and recommence work, which he never did.
- 13.15 On 22 March 2021, the Second Plaintiff tried to get the Respondent to meet with her at the Newlands Police Station where she thought she and the Respondent could reach a refund agreement of some sorts. The Respondent did not come.
- 13.16 On 10 May 2021, 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 immediately sent an email, dated the same day on 10 May 2021, to the Respondent informing the latter about the complaint lodged against him by the Second Plaintiff.
- 14.1 The Respondent's response was *"I am fully aware of the matter as stated by the Complainant and also not in denial of anything said. I am prepared to start paying the amount owed as from 31 August 2021 although I am unable to commit to any amount at this stage. Kindly note that I am also willing to continue with the work if given any chance."*
- 14.2 Further attempts by the First Plaintiff to bring the parties together in order to try and resolve this matter through alternative dispute resolution (ADR) process failed, primarily due to the transience of the Respondent.
- 14.3 The Second Plaintiff reached a position where she resolved she no longer trusted the Respondent; and just wished to recover all the monies she paid him with interest.

## THE HEARING

15. The hearing was held on 04 April 2022
- 15.1 The Hearing was held at the 24<sup>th</sup> Floor, 333 Bay House Building, Anton Lembede Street, Durban, 4001.
- 15.2 At the Hearing, the First Plaintiff and the Second Plaintiff confirmed the details of the complaint as contained under Background above.
- 15.3 At the Hearing, the Respondent confirmed everything as stated by the First Plaintiff and the Second Plaintiff that he (the Respondent) had been paid the total of R104 500.00 (ONE HUNDRED AND FOUR THOUSAND FIVE HUNDRED RAND) by the Second Plaintiff.
- 15.4 The Respondent argued, however, that an amount of R10 500.00 (TEN THOUSAND FIVE HUNDRED RAND) be deducted from the R104 500.00 (ONE HUNDRED AND FOUR THOUSAND FIVE HUNDRED RAND) received, claiming that the R10 500.00 (TEN THOUSAND FIVE HUNDRED RAND) was the amount spent on the foundations that had already been done. The Respondent could not provide any receipts in support of the amount he wanted to be deducted.
16. In light of the failure by the Respondent to build the double garages and the extension to the lounge, as per his contract with the Second Plaintiff, the First Plaintiff made a prayer that the Tribunal rules in favour of the Second Plaintiff and grants the Order in line with Paragraph 11 above.

## APPLICABLE SECTIONS OF THE CREDIT PROTECTION ACT 68 of 2008

### 17. Section 19

#### **Consumer's rights with respect to delivery of goods or supply of service**

*"(1) ...*

*(2) Unless otherwise expressly provided or anticipated in an agreement, it is an implied condition of every transaction for the supply of goods or services that –*

*(a) the supplier is responsible to deliver the goods or perform the services –*

*(i) on the agreed date and at the agreed time, if any, or otherwise within a reasonable time after concluding the transaction or agreement;*

*(ii) at the agreed place of delivery or performance; and*

(iii) *at the cost of the supplier, in case of delivery of goods; or*

18. **Section 47**

**Over-selling and over-booking**

(1) ....

(2) ...

(3) *If a supplier makes a commitment a commitment or accepts a reservation to supply goods or services on a specified date or at a specified time and, on the date and at a time contemplated in the commitment or reservation, fails because of insufficient stock or capacity to supply those goods or services, or similar or comparable goods or services of the same or better quality , class or nature, the supplier must -*

(a) *refund the amount, if any, paid in respect of that commitment or reservation, together with interest at the prescribed rate from the date on which the amount was paid until the date of reimbursement; and*

(b) *in addition, compensate the consumer for costs directly incidental to the supplier's breach of the contract ....*

**CONSIDERATION OF THE EVIDENCE BEFORE THE TRIBUNAL**

19. At the hearing, the Respondent conceded that he did not perform according to the contract signed between the two parties.

20. The Respondent blamed his failure to perform on the negative effects of the Disaster Management Act measures, especially the National Lockdown measures,

**CONSIDERATION OF THE ORDERS APPLIED FOR**

**Confirmation of termination of Agreement**

21. The First Plaintiff and the Second Plaintiff alleged that the Respondent failed to build the double garages and the extension to the lounge, as agreed to between the parties. The Respondent readily conceded that he did perform as per their building agreement.

22. The Tribunal had to carefully consider whether the Respondent's non-performance was mainly due the negative effects of the Disaster Management Act measures, especially the National Lockdown measures:
- 22.1 It is true that no building construction operations were permitted during the "Hard Lockdown" Alert Level 5 at the beginning of the Covid-19 pandemic in South Africa, which was primarily during March – June 2020.
- 22.2 The Respondent had however already failed to commence with the building construction at the beginning of March 2020, which was long before any positive cases of Covid-19 were even reported in South Africa and long before the highly restrictive Disaster Management Act and National Lockdown measures were announced.
- 22.3 The Respondent was paid by the Second Plaintiff for building contract in January 2020. The contract was that the work was going to be completed within two months, meaning February 2020 to March 2020. The Second Plaintiff alleged that the Respondent disappeared immediately after laying the concrete foundations at the beginning of February 2020. The Respondent can thus not invoke the *Vis Major* defence, as the non-performance commenced long before Covid-19 pandemic started in South Africa.
- 22.4 The Second Plaintiff continued to push the Respondent to start building long after the South African government had already adjusted the Alert Levels lower to Level 4, Level 3, Level 2, and Level 1. This is confirmation that the Respondent's non-performance was not due to Covid-19.
- 22.5 It was also brought to the attention of the Tribunal that the Respondent was involved in a school building building project somewhere in the rural areas, from where he usually complained about cellphone signal connectivity whenever the Second Plaintiff tried to call him and even when the First Plaintiff tried to call him.
23. The Respondent did not substantially argue that the main reason for his non-performance was Covid-19 related, despite alluding to this factor at the Hearing. It is therefore important that we look at some of the case law that some legal scholars and legal practitioners have cited in discussing whether and/or how Covid-19 can be used as a ***vis major* / *force majeure*** defence by parties accused of non-performance during the Covid-19 pandemic. The case of *Bischofberger v Van Eyk* 1981(2)SA607 (W)



has recently been widely quoted in cases where parties sought to cite the *vis major / force majeure* defence for Covid-19 related non-performance. In that case, the Court said

- 23.1 The Court must first recognize the general rule that impossibility of performance does in general excuse the performance of contract. In this particular Tribunal case, we could have been forced to seriously consider this if the Second Plaintiff's complaint was solely based around the Respondent's non-performance during the period when South Africa was still under "hard lockdown" Alert Level 5 or even Alert Level 4 at the beginning of the Covid-19 pandemic between March – June 2020.
- 23.2 The Court would be expected to look at the nature of the contract. This building contract between the Second Plaintiff and the Respondent was a very standard contract, where the Respondent undertook to build and complete building within two months. The Respondent failed to deliver on this promise; and simply chose to disappear and literally played hide-and-seek, forcing the Second Plaintiff to persistently pursue him for answers for a period over 17 (SEVENTEEN) months from February 2020 to May 2021.
- 23.3 The Court is expected to look at the relation of the parties. According to the Second Plaintiff's evidence given at the Hearing, the Respondent personally approached her when he noticed she desperately needed someone to do the renovations at her house, after the death of her husband. At the Hearing, the Second Plaintiff accused the Respondent of trying to take an advantage of her vulnerable position as a widow. The Second Plaintiff actually cried when she made this statement. Considering how dismissive the Respondent was towards the Second Plaintiff, there may be some truth in what the latter said; though there is no guarantee the Respondent could have behaved differently had the Second Plaintiff been male.
- 23.4 The Court is also expected to look at the circumstances of the case and the nature of the impossibility. In this case, Covid-19 did not create any long-term impossibility. The mere fact that the Respondent was actively involved in an even bigger school building project whilst playing hide-and-seek with the Second Plaintiff proves Covid-19 was not the main reason for the Respondent's non-performance.
- 23.5 The other issue raised in the Bischofberger case was whether the parties could have anticipated such impossibility. It is true that both parties in this case could not have reasonably anticipated the seriousness of the Covid-19 pandemic in South Africa, at the time they signed the building contract on the 20<sup>th</sup> of January 2020. The very first positive cases of Covid-19 were only reported in South Africa on the 5<sup>th</sup> of March 2020. But, this is simply a moot point, as it has been repeatedly made clear already

that Covid-19 was not the reason why the Respondent failed to build those double garages and a lounge extension within the 17 months was Second Plaintiff persistently asked him to deliver on his side of the contract.

24. Equally, the Respondent cannot reasonably expect the Tribunal to deduct the R10 500.00 (TEN THOUSAND FIVE HUNDRED RAND), he claims to have used in the concrete foundations, from the amount of R104 500.00 (ONE HUNDRED AND FOUR THOUSAND FIVE HUNDRED RAND) being claimed as the total refund by the Second Plaintiff. The Respondent is the architect of his own misfortune in this case, because he is the one who chose to disappear instead of building. There will be no unjust enrichment for the Second Plaintiff, as it is highly unlikely those foundations can still be used since the quality of the concrete there is likely to have deteriorated with the passage of time over the past two years.
25. Based on the above, the Tribunal concludes that the Respondent repeatedly contravened the provisions of Section 19(2)(a)(i) and Section 47(3) as alleged by both the First Plaintiff and the Second Plaintiff.

## **ORDER**

Accordingly, the Tribunal makes the following order:

26. The Respondent is declared to have engaged in prohibited conduct in contravening Section 19(2)(a)(i) and Section 47(3) of the Consumer Protection Act No 68 of 2008;
27. The building agreement between the Second Plaintiff and the Respondent is deemed to have terminated due to non-performance by the Respondent;
28. The Respondent is ordered to refund the Second Plaintiff the amount of R104 500.00 (ONE HUNDRED AND FOUR THOUSAND FIVE HUNDRED RAND) paid by the Second Plaintiff, in the form of R1 500.00 (ONE THOUSAND FIVE HUNDRED RAND) paid on 21 January 2020 as sundry payments, and R103 000.00 (ONE HUNDRED AND THREE THOUSAND RAND) paid on 30 January 2020 as the Deposit.
29. The interest will be payable on the amount of R104500 (ONE HUNDRED AND FOUR THOUSAND FIVE HUNDRED RAND), at the rate of 7.25 percent, with effect from 1 March 2020.

30. The total amount is payable within 60 (SIXTY) days of the date of this judgment.

31. There is no order as to costs.

DATED ON THIS 27<sup>th</sup> DAY OF APRIL 2022

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Prof B. Dumisa  
Chairperson

Ms. P. Dabideen (Member) and Ms. P. Ndlovu (Member) concurred