

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

Case Number: KZNCT1/2023

In the matter between:

KWAZULU NATAL CONSUMER PROTECTOR

FIRST PLAINTIFF

HANDRIAN MTHOKOZISI DUMISA

SECOND PLAINTIFF

(Name of the Consumer)

and

IKOR AUTO PARTS SUPPLIES (PTY)LTD

RESPONDENT

REGISTRATION NUMBER 4590262343

Coram:

Prof B. Dumisa – Chairperson & Presiding Member

Ms P. Dabideen – Member

Ms A Sewpersad – Member

Date of Hearing – 4 April 2023

Date of Judgment – 04 May 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 Ms Tereza Naude, 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 **HANDRIAN MTHOKOZISI DUMISA** a major male, who resides in New Germany, Pinetown, 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 5th July 2022.
7. At the hearing, the Second Plaintiff was represented by his legal representative Ms Nonhlanhla Mayise of Legalhero Pty Ltd

RESPONDENT

8. The Respondent is **IKOR AUTO PARTS SUPPLIES (PTY) LTD REGISTRATION NUMBER 4590262343** with its principal place of business situated at 136 Shepstone Road, New Germany, 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 and served of the details of the hearing. The Tribunal was satisfied that the Respondent was aware of the matter proceeding and that the Tribunal was entitled to proceed with the matter and hence the matter was heard on a default basis.

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 Declaring that the Respondent’s conduct is prohibited conduct, in contravention of Section 54(1)a to (d) read with Section 55(2)(a) to (c), Section 55(3), and Section 56(1)(2) of the Consumer Protection Act 68 of 2008 (the “CPA”);
 - 11.2 Directing the Respondent to refund the Second Plaintiff the full amount of **R55 200,00 (Fifty Five Thousand Rand)** being the total amount paid by the Second Plaintiff to the Respondent for the truck;
 - 11.3 Directing the Respondent to pay interest rate tempore morae;
 - 11.4 Directing the Respondent to pay an administrative penalty of R50 000,00 within the discretion of the KwaZulu-Natal Consumer Tribunal; and
 - 11.5 To order the Respondent to pay the legal costs of the Second Plaintiff
 - 11.6 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 relief to be granted.

BACKGROUND

13. The Second Plaintiff presented his evidence as follows:
 - 13.1 The Second Plaintiff was intent on purchasing a motor vehicle engine for a Hyundai iX 35 2.0 L elite (G4NA prefix engine);
 - 13.2 The Second Plaintiff contacted the Respondent , on or about 24 March 2021 indicating that he wanted to buy a motor vehicle engine for a Hyundai iX 35 2.0 L elite (G4NA prefix engine);
 - 13.3 In terms of the agreement reached the Respondent advised as follows;
 - 13.3.1 They would provide a brand new first hand engine
 - 13.3.2 They would order the engine from their supplier in India;
 - 13.3.3 They would charge Second Plaintiff R57 000,00 as the purchase price
 - 13.3.4 The installation of the engine would be for the Second Plaintiffs account
 - 13.3.5 The Second Plaintiff paid to the Respondent a total amount of R55 200,00 by the 20th July 2021
 - 13.4 The Respondent on the 22 July 2021 duly supplied the engine to the Second Plaintiff.
 - 13.4.1 The Second Plaintiff submitted that at time of delivery:
 - 13.4.2 There were no written terms and conditions of the engine or sale
 - 13.4.3 There were no installation procedures communicated for the sale
 - 13.4.4 There was no requirement that Second Plaintiff would need to use an RMI (Retail Motor Industry) registered mechanic to install the engine
 - 13.4.5 There was no warranty provided
 - 13.4.6 No engine registration number was reflected on the invoice
 - 13.4.7 No proof of purchase from supplier that he bought the engine from India and that this was a first-hand engine

- 13.5 The Second Plaintiff instructed his local ordinary mechanic Mr Thomas Mthembu to install the engine on 1 August 2021
- 13.5.1 The Second Plaintiff further submitted that the mechanic installed the engine without any breakage or damage
- 13.6 The Second Plaintiff on the 15th of September 2021 contacted the Respondent both telephonically and via email notifying the Respondent of the fault with the engine and the fact that the engine had actually broken down.
- 13.7 The Respondent advised the Second Plaintiff to take the vehicle to Hyundai Pinetown, where the source of the noise will be investigated, and the Second Plaintiff was required to make available photos so that the Respondent would be able to furnish them to the supplier. Second Plaintiff was reassured by the Respondent that his warranty will still be in place.
- 13.8 The vehicle was assessed at Hyundai and thereafter Second Plaintiff was assured by the Respondent that the vehicle would be collected from the Second Plaintiff and freighted to Rustenburg to their supplier who carried the warranty on the engine
- 13.9 Thereafter the Second Plaintiff received no further assistance from the Respondent for full period of nine weeks
- 13.10 The Second Plaintiff then contacted his legal advisors Legal Hero Pty Limited who having written to the Respondent did not receive any solution from the Respondent 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 it is relevant for the Tribunal to note that according to MIOSA the Respondent had confirmed to MIOSA that;
- 13.10.2 It had imported a new engine for the Second Plaintiff.
- 13.10.3 They had received a complaint from the Second Plaintiff, that a noise was emanating from the engine.
- 13.10.4 They confirmed having requested the Second Plaintiff to take the vehicle to Hyundai .
- 13.10.5 The Second Plaintiff had failed to do so and accordingly the Respondent could not assist the Second Plaintiff further.
- 13.10.6 Accordingly MIOSA recommended that the Respondent must collect the goods at their own risk and expense for assessment and warrantable repairs within 15 business days from the recommendations.

- 13.10.7 In accordance with MIOSA's recommendation the Respondent collected the engine from the Second Plaintiff on the 23rd of November 2021.
- 13.11 Despite numerous attempts by the Second Plaintiff to contact the Respondent Second Plaintiff received no further communication from the Respondent .
- 13.12 After 10 months of being without the purchased engine the Second Plaintiff on 5 July 2022 lodged 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 in an email dated 4 August 2022 advised the First Plaintiff as follows;
- 14.2 That Second Plaintiff had complained of a noise in the engine.
- 14.3 Despite reporting the noise, the Second Plaintiff was still driving the vehicle around.
- 14.4 That Second Plaintiff had changed some items on the engine, like the crank sensor.
- 14.5 The Respondents supplier had advised if the engine was under warranty the engine should have been removed immediately and brought back to the supplier.
- 14.6 Respondent was requested to supply proof that a qualified mechanic and RMI workshop fitted the engine.
- 14.7 Respondents supplier was prepared to repair the engine at the suppliers own cost and return the engine to the Second Plaintiff with a guarantee.
- 14.8 Respondent required the Second Plaintiff to return the exchange engine which Respondent alleges Second Plaintiff has not done to date.
- 14.9 The mechanic advised that the crank plate is damaged due to incorrect fitment of the crank sensor.
- 14.10 Respondent's supplier is still prepared to repair the customer's engine.
- 14.11 Based on the inability to resolve the dispute between the parties the First Plaintiff, decided to refer this matter to the KZN Consumer Tribunal for adjudication.

THE HEARING

- 15 The hearing was held on 4 April 2023.
- 15.1 The Hearing was held at the Durban 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 despite being properly notified.
- 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 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.*

17 Section 54

Consumer's rights to safe, good service

- (1) *When a supplier undertakes to perform any services for or on behalf of a consumer, the consumer has a right to*
- (b) *the performance of the services in a manner and quality that persons are generally entitled to expect;*
 - (c) *the use, delivery or installation of goods that are free of defects and of a quality that persons are generally entitled to expect, if any such goods are required for performance of the services; and*

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 The Tribunal had during the hearing requested the original invoice of the Respondent being Annexure A page 10 of the Second Plaintiffs affidavit was illegible.
- 21 A more legible copy of "Annexure A " albeit not the original document was made available to the Tribunal during its deliberations
- 22 On perusing the " Annexure A" it would appear that on the invoice under conditions of sale parts were guaranteed only if fitted by a qualified mechanic
- 23 The Second Plaintiff led evidence that he was not required to use a RMI approved mechanic and this is consistent with the invoice of the Respondent.
- 24 Whilst the Respondent chose not to appear at the hearing and present his version the tribunal in weighing the evidence of all concerned noted that in all the correspondence of the Respondent to the Second Plaintiff the Respondent did not at any stage advise the Second Plaintiff of the requirement of an RMI approved mechanic nor for that matter did he raise the issue of a qualified mechanic
- 25 There was no evidence placed by the Respondent before the tribunal to contest the qualification of the mechanic used by the Second Plaintiff.
- 26 Further in the recommendation of MIOSA where the Respondent's version is recorded the Respondent dispute the qualification of the mechanic or raise the requirement of an RMI approved mechanic
- 27 The Respondent chose only to raise the issue of a RMI qualified mechanic when contacted by the First Plaintiff.
- 28 The Tribunal notes further that there was no requirement of an RMI qualified mechanic on the invoice of the Respondent at any stage

- 30 The Tribunal noted that there was disparity in the emails sent by the Respondent to the Second Plaintiff initially and the First Plaintiff eventually
- 31 The Tribunal therefore must in the absence of the Respondents evidence take cognisance of the emails of the Respondent and weigh them against the evidence of the Second Plaintiff to determine the more probable version.
- 32 In so doing the Tribunal finds that in accordance with the CPA the Respondent had a duty to ensure the consumer receives safe goods of good quality and free of defects.
- 33 Similarly, the obligation to effect repairs at the request of the consumer rests on the Respondent as the supplier of the goods.
- 34 In terms of Section 53(1)(a) of the CPA a defect is defined as: "(i) any material imperfection in the manufacture of the goods or components or in preference of the services, which renders the goods or result of the service less accepted able than persons would be entitled to expect in the circumstances; or (ii) any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons would be entitled to expect in the circumstances.
- 35 The Respondent in his various emails Indicated that his supplier was willing to repair the engine in fact he ended his email off the 4th of August 2022 to the first plaintiff by stating "they are still prepared to repair the engine "
- 36 The Defendant totally ignored the recommendations of MIOSA
- 37 The Second Plaintiff also instructed his Attorneys to call upon the Respondent to comply with the MIOSA recommendation this which was equally ignored by the Respondent .
- 38 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

- 39 The Second Plaintiff prayed for the following order;
- 39.1 Declaring that the Respondent's conduct is prohibited conduct, in contravention of Section 54(1)a to (d) read with Section 55(2)(a) to (c), Section 55(3), and Section 56(1)(2) of the Consumer Protection Act 68 of 2008 (the "CPA");
- 39.2 Directing the Respondent to refund the Second Plaintiff the full amount of **R55 200,00 (Fifty Five Thousand Rand)** being the total amount paid by the Second Plaintiff to the Respondent for the engine;
- 39.3 Directing the Respondent to pay interest rate tempore morae;
- 39.4 Directing the Respondent to pay an administrative penalty of R50 000,00 within the discretion of the KwaZulu-Natal Consumer Tribunal; and
- 39.5 To order the Respondent to pay the legal costs of the Second Plaintiff
- 39.6 Any further and/or alternate relief.

ORDER

Accordingly, the Tribunal makes the following order:

- 40 The Respondent is declared to have engaged in prohibited conduct in contravening read with Section 54(1)(a) to (d), Section 55(2)(a) to (c), and Section 56(1) of the Consumer Protection Act No 68 of 2008;
- 41 The Defendant is ordered to refund the Second Plaintiff the full purchase price of R 55 200.00 (FIFTY FIVE THOUSAND HUNDRED RAND ONLY);
- 42 The Defendant is ordered to pay interest on the amount of R55 200.00 at the prescribed rate tempore morae.

43 The Defendant is ordered to pay an administrative penalty of R50 000.00 (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

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

45 There is no order as to costs.

DATED ON THIS 12 MAY 2023

**Ms P Dabideen
MEMBER**

Prof B. Dumisa (Chairperson and Presiding Member) and Ms. A Sewpersad (Member) concurred