

IN THE KWAZULU NATAL CONSUMER TRIBUNAL  
HELD IN RICHARDS BAY (King Cetshwayo District)

Case Number: KZNCT03/2023

In the matter between:

**KWAZULU NATAL CONSUMER PROTECTOR**

**FIRST PLAINTIFF**

**ZANDILE NOMSHADO NKOSI on behalf of**

**SECOND PLAINTIFF**

**EYAMTHANDA TRADING & CONSTRUCTION**

**(Name of the Consumer)**

**DEPARTMENT OF ECONOMIC DEVELOPMENT**

**THIRD PLAINTIFF**

**TOURISM AND ENVIRONMENTAL AFFAIRS/**

**OPERATION VULA FUND**

**KWAZULU-NATAL GROWTH FUND**

**FOURTH PLAINTIFF**

and

**CSP CONCEPTS (PTY)LTD T/A CSP POULTRY**

**DEFENDANT**

**(Reg No. 2006/033500/07)**

Coram:

Prof B. Dumisa – Chairperson & Presiding Member

Ms P. Dabideen – Member

Adv R. Hand – Member

Date of Hearing – 17 August 2023

Date of Judgment – 25 September 2023

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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 was deposed to by Ms Nombulelo Zondi, an Assistant Director and 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 Ms. **ZANDILE NOMSHADO NKOSI** a major female, acting on behalf of **Eyamthanda Trading & Construction**, who resides at Mgazini area, Ward 09, Umfolozi, 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 22 November 2022, on the advice of both the KZN Vula Fund and Growth Fund Administrators.

### THIRD PLAINTIFF

7. The Third Plaintiff is the **Department of Economic Development Tourism and Environment Affairs** which is responsible for the management and processes involved in the allocation of funding through the Vula Fund which was established in 2008 by the KZN Department of Economic Development Tourism and Environmental Affairs (EDTEA) as a key strategic initiative to accelerate Broad-Based Black Economic Development (B-BBEE), job creation, and economic growth in the Province of KwaZulu-Natal (hereinafter referred to as “the Third Plaintiff” or EDTEA).
8. At the Hearing on 17 August 2023, the Third Plaintiff was represented by Mr Xolani Dube, who is the Operation Vula Manager at EDTEA.

### FOURTH PLAINTIFF

9. The Fourth Respondent is the **KZN Growth Fund Trust (KGFT)** which is an entity of the Department of Economic Development Tourism and Environmental Affairs established as a unique public-private partnership venture to finance medium to large private sector projects. The main stimulus being to co-fund and or fund catalytic investments within high impact industries (hereinafter referred to as “the Fourth Plaintiff” or KGFT).
10. At the Hearing on 17 August 2023, the Fourth Plaintiff was represented by Ms Sthembile Bhengu who is responsible for the Operation Vula Fund at the KGFT.

### DEFENDANT

11. The Defendant is **CSP Concepts T/A CSP Poultry**, a duly registered company with registered number **2017/082536/07**, with its principal place of business situated at **Poongas Kraal 332516, N11 Road, Newcastle**, in the Province of KwaZulu-Natal, which address it has chosen as its domicilium citandi et executandi (hereinafter referred to as “the Respondent”). The sole owner of the business is Mr **Sibusiso Phakathi**.

12. The Defendant did not attend despite being properly notified and served of the details of the hearing, at least three times. The Tribunal was satisfied that the Defendant 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

13. 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 47(3) and Section 65(2)(b) and (c), of the Consumer Protection Act No 68 of 2008 (the CPA).
14. The Second Plaintiff sought an order against the Defendant in the following terms:
- 14.1 Declaring that the Respondent’s conduct is prohibited conduct, in contravention of Section 4(5)a, Section 15, Section 47(3), and Section 65(2)(b) and (c) of the Consumer Protection Act 68 of 2008 (the “CPA”);
- 14.2 Directing the Respondent to refund the Fourth Plaintiff, the KZN Growth Fund Trust, the full amount of **R195 850,00 (one hundred and ninety five thousand Rand and eight hundred and fifty Rand)** being the total amount paid by the Fourth Plaintiff to the Defendant for the total goods ordered and paid for in full.
- 14.3 Interest to be made payable on the amount referred to under 14.2 at the mora rate in terms of the Prescribed Rate of Interest Act 53 of 1975.
- 14.4 To order the Defendant to pay all the above payments within 15 days of the judgment.
- 14.5 Directing the Defendant to refrain from conducting business in a manner that is inappropriate and to pay an administrative penalty of an amount determined by the Consumer Tribunal as appropriate under the circumstances and any other appropriate order contemplated under Section 4(2)(b)(ii) of the CPA.
- 14.6 Further or alternative relief.

## **MATTERS TO BE DECIDED**

- 15. The Tribunal has to decide whether:
  - 15.1 The Defendant breached the provisions of the Act as alleged; and
  - 15.2 The appropriate relief to be granted.

## **BACKGROUND**

- 16. At the beginning of the year 2021, the Second Plaintiff successfully applied for funding under the Third Plaintiff's Operation Vula Fund – Tier 1; where EDTEA, in a letter dated 11 February 2021, the EDTEA Head of Department Mr N Nkotwana confirmed that R200 000.00 had been approved to this effect.
- 17. On 10 August of 2021 the Second Plaintiff requested and obtained a quotation from the Defendant for the supply of goods required for the establishment of her poultry farming project. The quote was to the value of R195 850.00. See Annexure A for the full list of goods and services ordered.
  - 17.1 On 15 October 2021 the transaction was completed as the Defendant was paid via EFT by the Fourth Plaintiff, the KZN Growth Fund, an amount of R195 850.00 (one hundred and ninety five thousand Rand eight hundred and fifty Rand only).
  - 17.2 Following the transaction on 15 October 2021, the goods and services procured by the Second Plaintiff were never delivered by the Defendant and in fact, to date there has been no delivery
  - 17.3 Since the aforementioned payment the Second Plaintiff failed at all her attempts to get the Defendant to provide all goods and services as requested. Consequently she could not start her intended poultry business and had to abandon her business plans.

- 17.4 Due to the lack of cooperation from the Defendant and his intentional failure to provide the procured goods and services indicated above, the Second Plaintiff lodged a written complaint with the First Plaintiff on 22 November 2022, as advised by both the Third Plaintiff and the Fourth Plaintiff.
- 17.5 The First Plaintiff tried to resolve this matter but failed due to the Defendant's lack of cooperation; hence it being referred to the KZN Consumer Tribunal for a Hearing.

### **FIRST PLAINTIFF'S EFFORTS TO RESOLVE THIS COMPLAINT**

18. As already stated earlier, all the First Plaintiff's efforts to resolve this matter were in vain because of the Defendant's total lack of cooperation and total disregard for the processes of the Office of the KZN Consumer Protector.

### **THE HEARING**

19. The hearing was held three times, on three different dates:
- 19.1 The Hearing was first held on 16 May 2023 at the Newcastle Offices of the KwaZulu-Natal Department of Economic Development Tourism and Environmental Affairs (EDTEA), where it had to be postponed because of concerns about the nature of the complaint and the complex nature of the Second Plaintiff's prayers at that stage.
- 19.2 The Hearing was again held for the second time on 8 June 2023 at the King Cetshwayo (Richards Bay) Offices of the EDTEA, where the First Plaintiff made an application for an adjournment to enable the First Plaintiff to formally join both EDTEA and the KZN Growth Fund as parties to the proceedings. This was to be done in order avoid some challenges which could have arisen if the Second Plaintiff had successfully had the R195850 paid back directly to her. The matter was thus further postponed to 17 August 2023 where both EDTEA and the KZN Growth Fund were to be formally and officially enjoined on this matter, as the Third Plaintiff and the Fourth Plaintiff respectively.
- 19.3 The hearing was finally held on merits on 17 August 2023, where the Third Plaintiff and the Fourth Plaintiff were now officially formally enjoined.

- 19.4 After being properly served at least three times earlier, the Defendant had not formally indicated their intention to defend the matter, nor did they attend the hearings despite being properly notified.
- 19.5 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**

### **20. Section 4(5)**

#### **Realization of consumer rights.**

- (5) *In any dealings with a consumer in the ordinary course of business, a person must not -*
- (a) engage in any conduct contrary to, or calculated to frustrate or defeat the purposes and policy of, this Act;*
  - (b) engage in any conduct that is unconscionable, misleading or deceptive, or that is reasonably likely to mislead deceive; or*
  - (c) make any representation about a supplier or any goods or services, or a related matter, unless the person has reasonable grounds for believing that the representation is true.*

### **21. Section 19(2)**

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

- (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 time, if any, or otherwise within a reasonable time after concluding the transaction or agreement;*
    - (ii) at the agreed place of delivery or performance;*
    - (iii) at the cost of the supplier, in the case of delivery of goods; or*
  - (b) the agreed place of delivery of goods or performance of services is the supplier's place of business, if the supplier has one, and if not, the supplier's residence; and*
  - (c) goods to be delivered remain at the supplier's risk until the consumer has accepted delivery of them, in accordance with this section.*

- (3) *If an agreement does not provide a specific date or time for delivery of any goods or performance of any services, the supplier must not require that the consumer accept delivery or performance of the services at an unreasonable time.*

22. **Section 47(3)**

**Over-selling and over-booking**

- (3) *If a supplier makes 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 the 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 to the consumer 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, except to the extent that subsection subsection (5) provides otherwise.*
- (4) ....
- (5) *Subsection (3) (b) does not apply if –*
- (a) *the shortage of stock or capacity is due to circumstances beyond the supplier's control, subject to subsection (6) and*
  - (b) *the supplier took reasonable steps to inform the consumer of the shortage of stock or capacity as soon as it was practicable to do so in the circumstances.*
- (6) *Without limiting the generality of subsection (5)(a), a shortage of stock or capacity is not “due to circumstances beyond the supplier's control” if the shortage results partially, completely, directly or indirectly from a failure on the part on the part of the supplier to adequately carry out any ordinary or routine matter pertaining to the supplier's business.*

**CONSIDERATION OF THE EVIDENCE BEFORE THE TRIBUNAL**

23. The Tribunal requested all the Plaintiffs to supply all the necessary relevant information that is important to the Tribunal to make the appropriate decisions based on all the information requested.



24. The Defendant's conscious and deliberate arrogance and lack of cooperation means that he will have been an architect of his own misfortune should it happen that this Tribunal will arrive at certain decisions which could have been decided otherwise had the Tribunal had the benefit of his (the Defendant's) own submissions on these matters.
25. As things stand now, the Tribunal just has one uncontested version that the Second Plaintiff ordered goods and services to the value of R195 850.00, the Fourth Plaintiff paid for in full on 15 October 2021.
26. Mr Sibusiso Phakathi, who is the Defendant and the sole owner of CSP Poultry must be held personally responsible for all the many breaches of the CPA and more, which includes but not necessarily confined to:
  - 26.1 By refusing to cooperate with the First Plaintiff the Defendant was directly in breach of Section 4(5)(a) of the Act which says businesses must not engage in any conduct contrary to, or calculated to frustrate or defeat the purposes and policy of the CPA;
  - 26.2 The Defendant acted in an unconscionable manner by receiving R195 850.00 from the Fourth Plaintiff on 15 October 2021 and yet failing to deliver the goods and services that the Second Plaintiff had ordered. This is in direct breach of Section 4(5)(b);
  - 26.3 The Defendant is in clear violation of Section 15 of the CPA in that they provided a detailed Quotation for the Second Plaintiff, so that the Fourth Plaintiff would pay them R195 850.00, for goods and services that they had no intention of delivering; and
  - 26.4 The Defendant is in clear violation of various subsections of Section 47 of the CPA:
    - i. In breach of subsection 47(3), the Defendant accepted R195 850.00 from the Fourth Plaintiff and made a commitment to the Second Plaintiff to supply the goods and services on a specified date and yet failed to honour their commitments without even bothering to explain themselves to anyone;
    - ii. The Defendant failed to even consider refunding the Second Plaintiff the money which had been paid for the goods and services ordered but not supplied, which could have been in line with subsection 47(3)(a). It was precisely for this reason why both the Third Plaintiff and the Fourth Plaintiff were later enjoined. The direct involvement of both EDTEA and the KZN Growth Fund Trust will ensure that these two government arms will ensure they use all the levers of power they have at their disposal in ensuring that the government speedily gets its money back with interest and also ensure that appropriate criminal charges are laid against the Defendant; and

iii. The Defendant has acted in gross violation of Section 65(2)(b) in holding on to the R195 850.00 as if it is their despite knowing that they did not supply the goods and services ordered.

27. EDTEA and the KZN Growth Fund Trust, the Third and Fourth Plaintiffs respectively, owe it to the South African taxpayers to protect them from the likes of the Defendant, Sibusiso Phakathi and CSP,
- 27.1 This is definitely one of those consumer cases where criminal charges must also be laid against the Defendant;
- 27.2 Where stricter and quicker debt collection enforcement measures may need to be implemented;
- 27.3 Where the Defendant must be blacklisted from ever doing any business with the South African government and / or any of its arms; and
- 27.4 Where, if need be, freezing of Sibusiso Phakathi's assets must be seriously considered "as proceeds of crime" as a way of ensuring he is appropriately penalised.

#### CONSIDERATION OF THE ORDERS APPLIED FOR

28. The Second Plaintiff prayed for the following order;
- 28.1 Declaring that the Defendant's conduct is prohibited conduct, in that the Defendant contravened numerous provisions of consumer legislation, including but not confined to, Section 4(5), Section 15, Section 47(3), and Section 65(2)(b) and (c) of the Consumer Protection Act 68 of 2008 (the "CPA"). Taking into consideration the fraudulent manner in which the Defendant has conducted himself since being paid on 15 October 2021, such a declaration will be promote the spirit and purposes of this Act, as appropriately covered by Section 4(2)(b)(i);
- 28.2 Directing the Defendant to refund the Fourth Plaintiff the full amount of **R195 580.00 (one hundred and ninety five thousand Rand eight hundred and fifty Rand only)** being the total amount paid by the Fourth Plaintiff paid the Defendant via EFT on 15 October 2021 for the goods and services ordered by the Second Plaintiff. It is important to clarify that, under normal circumstances, the refund is usually payable to the Consumer, that is The Second Plaintiff in this case. The approach is deliberately different in this case; the refund will be to the Fourth Plaintiff, the KZN Growth Fund Trust, as they are the ones who directly paid this amount to the Defendant; for goods and services not delivered. As the basis for paying the Defendant is non-existent, the Fourth Plaintiff is thus legally entitled to get back this money with interest. There were serious legal questions about the Second Plaintiff's legal right to be directly refunded this amount, hence the later enjoiner of both EDTEA and KGFT as Plaintiffs on this matter;

- 28.3 Directing the Defendant to pay interest rate tempore morae;
- 28.4 Directing the Respondent to pay an administrative penalty within the discretion of the KwaZulu-Natal Consumer Tribunal; and
- 28.5 Any further and/or alternate relief.

### **AN APPROPRIATE CASE PRECEDENT FOR THIS MATTER**

- 29 This KZN Consumer Tribunal heard an almost similar matter KZNCT11/2022 Gregory Canning v Zululand Guns and Ammo (Pty) Ltd last year in September 2022, where Gregory Canning had paid R12274.00 to the Defendant for some game farm accessories on behalf of a non-government organisation, Wild Tomorrow Fund South Africa NCP. The Defendant there had done exactly what the Defendant has done here, not supplying the goods already paid for, and also not cooperating with the First Plaintiff in its investigations.
- 30 In the Gregory Canning case, the Tribunal found that the Defendant had engaged in prohibited conduct; ordered the refund of the R12274.00 paid, and also ordered the Defendant to pay an administrative fine of R50 000.00.

### **ORDER**

Accordingly, the Tribunal makes the following order:

- 31. The Respondent is declared to have engaged in prohibited conduct in contravening, inter alia, but not confined to Section 4(5)(a), Section 15, Section 19(2), Section 47(3) and Section 65(2)(b) and (c) of the Consumer Protection Act No 68 of 2008.
- 32. The Defendant is ordered to refund the Fourth Plaintiff the full purchase price of R195 850.00 (one hundred and ninety five thousand Rand eight hundred and fifty Rand) being the total amount paid by the Fourth Plaintiff to the Defendant for goods and services ordered by the Second Plaintiff.

33. The Defendant is ordered to pay interest of 11.75 percent per annum on the amount of R195 850.00, compounded annually. This implies the total amount payable and due to the Fourth Plaintiff, the KZN Growth Fund Trust as on 15 October 2023 will be R244 578.70 payable to:

**Bank Name** : Standard Bank  
**Account Holder** : The KZN Growth Fund Trust  
**Account Number** : 271275243  
**Branch Code** : 051001  
**Branch Name** : Kingsmead  
**Reference** : CSP Poultry

34. The Defendant is ordered to pay an administrative penalty of R200 000.00 (Two Hundred 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 0105  
**BRANCH NAME** : ABSA BUSINESS CENTRE – KZN  
**BRANCH CODE** : 630495  
**Reference** : KZNCT03/2023 and Name of Person or Business making payment

35. The total amounts are payable within 30 (SIXTY) days of the date of this judgment.
36. There is no order as to costs.

**DATED ON THIS 25 September 2023**

**Prof B. Dumisa**  
**Chairperson and Presiding Member**

**Ms P Dabideen (Member) and Adv. R. Hand (Member) concurred**