

IN THE KWAZULU NATAL CONSUMER TRIBUNAL
HELD IN DUNDEE(HEARD VIRTUALLY)

Case Number: KZNCT16/2024

In the matter between:

KWAZULU NATAL CONSUMER PROTECTOR **FIRST PLAINTIFF**

MHLENGI CLEMENT NXUMALO **SECOND PLAINTIFF**

(Name of the Consumer)

DEPARTMENT OF ECONOMIC DEVELOPMENT **THIRD PLAINTIFF**

TOURISM AND ENVIRONMENTAL AFFAIRS/

OPERATION VULA FUND

KWAZULU-NATAL GROWTH FUND **FOURTH PLAINTIFF**

and

PLAYTIME ENTERTAINMENT **FIRST DEFENDANT**

LINDANI ZIKHALI **SECOND DEFENDANT**

Coram:

Ms N Cawe – Deputy Chairperson & Presiding Member

Ms P. Dabideen – Member

Adv R. Hand – Member

Date of Hearing – 26 November 2024

Date of Judgment – 2 December 2024

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 Plaintiff's Investigation Report was deposited to by Ms Thandeka Makhathini 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 Mr **MHLENGI CLEMENT NXUMALO** . a major male, who resides at Sibongile Location Dundee 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 Defendants on 7th June 2024 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).

FOURTH PLAINTIFF

8. The Fourth Defendants 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).
9. At the Hearing on 26 November 2024, the Fourth Plaintiff was represented by MXOLISI DLAMINI who is responsible for the Operation Vula Fund at the KGFT.

DEFENDANT

10. The First Defendant is **PLAYTIME ENTERTAINMENT**, a duly registered company with registered number K2012155800, with its principal place of business situated at 872 Nxumalo Street Sibongile Location Dundee, in the Province of KwaZulu-Natal, which address it has chosen as its domicilium citandi et executandi (hereinafter referred to as "the Defendants"). The Second Defendant Mr Lindani Zikhali is the sole director of the First Plaintiff
11. The Defendants did not enter an Appearance to Defend but the Second Defendant appeared virtually at the hearing unrepresented.

APPLICATION TYPE AND ORDER SOUGHT

12. 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 19 and Section 65(2)(b) and (c), of the Consumer Protection Act No 68 of 2008 (the CPA).
13. The Second Plaintiff sought and the Tribunal accepted the amendment to the order prayed against the Defendant in the following terms:
 - 13.1 Declaring that the Defendants conduct is prohibited conduct, in contravention of Section 4(5)a, Section 19 and Section 65(2)(b) and (c) of the Consumer Protection Act 68 of 2008 (the "CPA");

- 13.2 Directing the Defendants to refund the Fourth Plaintiff, the KZN Growth Fund Trust, the full amount of **R74 150.00 (seventy four thousand and one hundred and fifty rand)** being the total amount paid by the Fourth Plaintiff to the Defendants for the total goods ordered and paid for in full.
- 13.3 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.
- 13.4 To order the Defendants to pay all the above payments within 15 days of the judgment.
- 13.5 Directing the Defendants 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.
- 13.6 Further or alternative relief.

MATTERS TO BE DECIDED

14. The Tribunal has to decide whether:

- 14.1 The Defendants breached the provisions of the Act as alleged; and
- 14.2 The appropriate relief to be granted.

BACKGROUND

15. At the beginning of the year 2022, the Second Plaintiff successfully applied for funding under the Third Plaintiff's Operation Vula Fund – Tier 1; where EDTEA, confirmed that **R74 150.00** had been approved to this effect.
16. On 15 March 2022 the Second Plaintiff requested and obtained a quotation from the First Defendant for the supply of goods required for the establishment of her poultry farming project. The quote was to the value of R74 150.00. See Annexure A for the full list of goods and services ordered.

- 16.1 The First Defendant was paid an amount of R74 150.00. by the Fourth Plaintiff, the KZN Growth Fund.
- 16.2 Following the transaction on 15 March 2022, the goods and services procured by the Second Plaintiff were never delivered by the Defendants and in fact, to date there has been no delivery
- 16.3 Since the aforementioned payment the Second Plaintiff failed at all his attempts to get the Defendant to provide all goods and services as requested. Consequently he could not start her intended poultry business and had to abandon his business plans.
- 16.4 Due to the lack of cooperation from the Defendants 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 7 June 2024 , as advised by both the Third Plaintiff and the Fourth Plaintiff.
- 16.5 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

17. 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

18. The hearing was held on 26 November 2024
- 19.4 After being properly served at least three times earlier, the Defendant had not formally indicated their intention to defend the matter, however they attended the hearing.
- 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 or 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 65(2)

Supplier to hold and account for consumer's property

(2) *When a supplier has possession of any prepayment, deposit, membership fee, or other money, or any other property belonging to or ordinarily under the control of a consumer, the supplier—*

((b) in the handling, safeguarding and utilisation of that property, must exercise the degree of care, diligence and skill that can reasonably be expected of a person responsible for managing any property belonging to another person; and

(c) is liable to the owner of the property for any loss resulting from a failure to comply with paragraph (a) or (b).

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 Second Defendant without filing an intention to defend appeared at the hearing. As both the Defendants were unrepresented the Tribunal indulged them and allowed Second Defendant an opportunity to place his version before the Tribunal. The Second Defendants version was that he had given the Second Plaintiff a laptop and that the Second Plaintiff was not being truthful to the Tribunal. This version was rejected by the Tribunal as being improbable as there was no provision on the quotation for a laptop nor did the Defendant present any evidence of this. The Defendant was unable to refute the version of the Second Plaintiff
25. As things stand now, the Tribunal has one uncontested version that the Second Plaintiff ordered goods and services to the value of R74 150.00 and the Fourth Plaintiff on behalf of the Second Plaintiff paid the Defendants for this purchase in full on 15 March 2022.
26. Mr Lindani Zikhali who is the Second Defendant and the sole director of Playtime Entertainment 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 R 74 150.00 from the Fourth Plaintiff on 15 March 2022 and yet failed 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 R 74 150.00, 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 R 74 150.00 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 R74 150.00 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 Defendants, Mr Lindani Zikhali and Playtime Entertainment ,

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 Mr Lindani Zikhali and Playtime Entertainment Pty Ltd , assets must be seriously considered "as proceeds f 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 Defendants 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 March 2022, such a declaration will 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 R74 150.00 (**seventy four thousand rand one hundred and fifty Rand only**) being the total amount paid by the Fourth Plaintiff paid the Defendant via EFT on 15 March 2022 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 enjoinder 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 Defendants 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 KZNCT03/2023 Zandile Nkosi v CSP Concepts (Pty)Ltd T/A Csp Poultry last year in 17 August 2023, where EDTEA and the KZN Growth Fund Trust had paid R195 850.00 (one hundred and ninety five thousand Rand eight hundred and fifty Rand) to the Defendant for poultry equipment on behalf of a funding recipient Zandile Nkosi. The Defendant in that case had done exactly what these Defendants have done here, not supplying the goods already paid for, and also not cooperating with the First Plaintiff in its investigations.
- 29 In the Zandile Nkosi v Csp Poultry case the Tribunal found that the Defendant had engaged in prohibited conduct; ordered the refund of the R195 850.00 (one hundred and ninety five thousand Rand eight hundred and fifty Rand) and also ordered the Defendant to pay an administrative fine of R200 000.00.

ORDER

Accordingly, the Tribunal makes the following order:

31. The Defendants are 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 **R74 150.00 (seventy four thousand and one 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 **R74 150.00**, compounded annually from 15 March 2022 to date of payment both days included . This amount is payable and due to the Fourth Plaintiff, the KZN Growth Fund Trust whose account details are as follows :

Bank Name : Standard Bank
Account Holder : The KZN Growth Fund Trust
Account Number : 271275243
Branch Code : 051001
Branch Name : Kingsmead
Reference : PLAYTIME ENTERTAINMENT

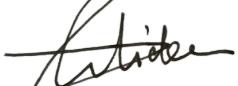
34. The Defendant is ordered to pay an administrative penalty of R100 000.00 (One Hundred Thousand Rand only) to the bank account of the KwaZulu-Natal Provincial Revenue Fund: Banking Details are as follows:

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 60 (SIXTY) days of the date of this judgment.

36. There is no order as to costs.

DATED ON THIS 2 December 2024



Ms P Dabideen
Member

Ms N Cawe (Deputy Chairperson and Presiding Member) and Adv. R. Hand (Member) concurred