

IN THE KWAZULU NATAL CONSUMER TRIBUNAL
HELD IN MKHUZE, UMKHANYAKUDE DISTRICT

Case Number: KZNCT19/2024

In the matter between:

KWAZULU NATAL CONSUMER PROTECTOR

FIRST PLAINTIFF

THEMBISILE MHLONGO on behalf of

SECOND PLAINTIFF

INQABAYAMANDLA GARDEN PRIMARY

COOPERATIVE LIMITED

(Name of the Consumer)

NATIONAL MOVEMENT OF RURAL WOMEN

THIRD PLAINTIFF

(NMRW)

and

INCWETI FARMERS EQUIPMENT SUPPLIES

FIRST DEFENDANT

(Business Reg No. 2023/80628/07)

NELSON PHINDA MPONTSHANA

SECOND DEFENDANT

Coram:

Prof B. Dumisa – Chairperson & Presiding Member

Ms N. Cawe – Member & Deputy Chairperson

Adv R. Hand – Member

Date of Hearing – 03 December 2024

Date of Judgment – 21 January 2025

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 Nokwanda Dindi, a Complaints Handler and an Investigator within the Office of the KwaZulu-Natal Consumer Protector, at its Umkhanyakude District Office, in Mkhuzi, in the Province of KwaZulu-Natal.

SECOND PLAINTIFF

5. The Consumer, who is the Second Plaintiff in this matter is Ms. **THEMBISILE MHLONGO**, a major female, acting on behalf of **INQABAYAMANDLA GARDEN PRIMARY COOPERATIVE LIMITED**, who is the Chairperson of this Cooperative and resides at Ophansi area, KwaJobe, 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 Defendant on 01 August 2024; and represented herself at the hearing.

THIRD PLAINTIFF

7. The Third Plaintiff is the **NATIONAL MOVEMENT OF RURAL WOMEN (NMRW)** is a registered Non-Profit Organization, NPO, operating parts of South Africa, specifically in KwaZulu-Natal, Mpumalanga, North-West and Limpopo (hereinafter referred to as “the Third Plaintiff” or the NMRW). It has employees in these Provinces to secure services for the purpose of complying with the requirements of the Co-operatives. They use service providers appointed by Co-operatives to their work.

DEFENDANT

FIRST DEFENDANT

8. The First Defendant is **INCWETI FARMERS SUPPLIES**, a duly registered company with registered number **2023/80628/07**, with its principal place of business situated at Ezimpisini, Ndumo, in the Province of KwaZulu-Natal, which address it has chosen as its *domicilium citandi et executandi* (hereinafter referred to as “the First Defendant”).

SECOND DEFENDANT

9. Mr **NELSON PHINDA MPONTSHANA** is the sole owner of the First Defendant business; and has been joined to the matter as the Second Defendant because he had all times identified himself as the owner of the business and therefore as a representative of the First Defendant (hereinafter referred to as “the Second Defendant” or Nelson Mpontshana). He therefore at all times communicated with the Second Plaintiff and provided her with the quotation for the services the latter sought.
10. Subsequent to obtaining the quotation from the Defendants, the Second Plaintiff provided this quotation to the Third Plaintiff, as the latter was expected to directly pay the Defendants for the goods and services procured.
11. For ease of writing, any reference to the “Defendant” will thus imply any or both of the two between the First Defendant or the Second Defendant.

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 19, and Section 65(2)(b) and (c) of the Consumer Protection Act 68 of 2008 (the "CPA");
 - 14.2 Directing the Defendant to refund the Third Plaintiff, the National Movement of Rural Women, the full amount of **R71, 991.48 (Seventy-one thousand nine hundred and ninety-Rand and forty-eight cents)** being the deposit amount paid by the Third Plaintiff to the Defendant.
 - 14.3 Interest to be made payable on the amount referred to under 11.2 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 collect his goods from the Second Plaintiff's place of business by a certain date determined by the Consumer Tribunal.
 - 14.6 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.
 - 14.7 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 2024, the Second Plaintiff was successfully nominated as a beneficiary for funding by the Third Plaintiff NMRW organization after the former met the necessary applicable criteria.
17. On the 22nd of January 2024 the Second Plaintiff requested and obtained a quotation from the Defendant for the supply of goods required for the establishment of her plantation project. The quote was to the value of R90 394.96.
 - 17.1 The transaction was completed as the Defendant was paid via EFT by the Third Plaintiff an amount of R71 991.48 (Seventy-one thousand nine hundred and ninety-Rand and forty-eight cents) on the 6th of February 2024, being the deposit for the goods and services quoted.
 - 17.2 Following the transaction on the 22nd of January 2024, the goods and services procured by the Second Plaintiff were never delivered by the Defendant on the agreed date and time.
 - 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 plantation 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 the 1st of August 2024.
- 17.5 The First Plaintiff tried to resolve this matter, from the 20th of August 2024 onwards, but failed due to the Defendant's repeated excuses and promises never fulfilled; 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. On the 31st of October 2024, the Defendant was properly served with Summons initiating proceedings in the KwaZulu-Natal Consumer Tribunal, in terms of Section 21(1) and 34(1) of the KwaZulu-Natal Consumer Protection Act 04 of 2013. The Summons indicated that proceedings would commence at the EDTEA UMKHANYAKUDE DISTRICT OFFICE, in Mkhuze, on the 3rd of December 2024.
20. The Hearing was held on the 3rd of December 2024 where the Defendants did not attend; and the matter was heard on a default basis.

APPLICABLE SECTIONS OF THE CONSUMER PROTECTION ACT 68 of 2008

21. **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.*

22. **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.*

23. **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

24. 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 misfortunate 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 from the Defendant, for which an amount of R71 991.48 was paid to the Defendants by the Third Plaintiff on the 6th of February 2024.
26. Mr Nelson Phinda Mpontshana, who is the Second Defendant and the sole owner of Incweti Farmers Equipment Supplies 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 fully 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 R71 991.48 from the Third Plaintiff on the 6th of February 2024 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 Third Plaintiff would pay them R71 991.48, 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 R71 991.48 from the Third 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 the Third Plaintiff was enjoined; and
 - iii. The Defendant has acted in gross violation of Section 65(2)(b) in holding on to the R71 991.48 as if it is theirs despite knowing that they did not supply the goods and services ordered.
27. The Third Plaintiff, owe it to their shareholders to protect them from the likes of the Defendant, Nelson Phinda Mpontshana and his businesses,
 - 27.1 This is definitely one of those consumer cases where criminal charges must also be laid against the Defendants;
 - 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 Nelson Phinda Mpontshana'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 the 6th of February 2024, 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, both the First Defendant and Second Defendant, to refund the Fourth Plaintiff the full amount of **R71 991.48 (Seventy-one thousand nine hundred and ninety-rand and forty-eight cents)** being the deposit amount paid by the Third Plaintiff to the Defendant via EFT on the 6th of February 2024 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 Third Plaintiff, the National Movement of Rural Women, NMRW, 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 Third 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 enjoiner of the NMRW as the Third Plaintiff on this matter;

28.3 Directing the Defendant, both the First Defendant and Second Defendant, to pay interest rate tempore morae;

28.4 Directing the Defendant, both the First Defendant and Second Defendant, 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 PRECEDENTS FOR THIS MATTER

29 This KZN Consumer Tribunal previously heard two almost similar matters before, namely, KZNCT11/2022 Gregory Canning v Zululand Guns and Ammo (Pty) Ltd 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.

31 Similarly, in KZNCT03/2023 Zandile Nkosi v CSP Concepts (Pty) Ltd, where Operation Vula which is part of the KwaZulu-Natal Growth Fund had paid R195850.00 with interest to the Defendant for poultry farming related goods and services; and where the Defendant did not supply the goods and services that the government had already paid for.

32 In the Zandile Nkosi case, the KwaZulu-Natal Consumer Tribunal found also found that the Defendant had engaged in prohibited conduct; and ordered the refund of the R195 850.00 paid with interest and also ordered the Defendant to pay an administrative penalty of R200 000.00 .

ORDER

Accordingly, the Tribunal makes the following order:

33. The Defendant, both the First Defendant and Second Defendant, 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.
34. The Defendant, both the First Defendant and Second Defendant, is ordered to refund the Third Plaintiff the deposit of R71 991.48 (Seventy-one thousand nine hundred and ninety-one Rand and forty-eight

cents) being the deposit amount paid by the Third Plaintiff to the Defendant for goods and services ordered by the Second Plaintiff.

35. The Defendant, both the First Defendant and Second Defendant, is ordered to pay interest of 11.75 percent per annum on the amount of R71 991.48, compounded annually. This implies the total amount payable and due to the Third Plaintiff, the NMRW, on the 6th of February 2024 will be R80 450.48 payable to:

Bank Name : ABSA
Account Holder : NATIONAL MOVEMENT OF RURAL WOMEN NPC
Account Number : 40 6231 7100
Branch Code : 632005
Swift Code : ABSAZAJJ
Reference : Incweti Farmers Equipment Supplies / Nelson Phinda Mpontshana

36. The Defendant, both First Defendant and Second Defendant, is ordered to pay an administrative penalty of R80 000.00 (Eighty 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 : KZNCT19/2024 and Name of Person or Business making payment

37. The total amounts are payable within 30 (Thirty) days of the date of this judgment.

38. There is no order as to costs.

DATED ON THIS 21 January 2025

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

Ms N. Cawe (Member and Deputy Chairperson) CONCURRING and Adv R Hand (Member) DISSENTING

DISSENTING JUDGEMENT BY ADV R HAND:

39. I have had the benefit of reading the judgment penned by my Tribunal colleague Professor B. Dumisa and although I am in agreement with the result, and for the most part with the orders in paragraphs 33 to 38 (inclusive), I cannot concur with the finding in paragraph 26.4. To my mind there is no “clear violation of various sections of Section 47 of the CPA” as I will discuss below.
40. Paragraph 23 of the judgment helpfully sets out the text of the relevant portions of section 47 so that need not be repeated.
41. It would seem to me that in order for there to be a contravention of the section on the facts in this matter there needs to have been an undertaking to supply goods on a specified date, a failure to supply on that specified date because (my emphasis) of insufficient stock or capacity and then non-compliance with the requirement in section 47 (3) (a) and (b) to refund any amounts paid, if any together with interest as well as costs incidental to the supplier’s breach of the contract.
42. The matter proceeded before the tribunal on a default basis so there is no version proffered by the second defendant. This is no doubt due to his “total lack of cooperation and total disregard for the processes of the Office of the KZN Consumer Protector”¹. This does however mean that there has been no claim of either a stock shortage or lack of capacity as a reason for the failure to supply. In fact, the minimal evidence before the Tribunal goes completely the other way. For that reason it is certainly true that the Tribunal has only one

¹ Para 18 above

uncontested version before it, that the second plaintiff ordered goods for which the third plaintiff paid R71 991.48. That the goods were never delivered is, equally, undisputed.

43. Given the second defendant's conduct it would seem that he has simply appropriated the funds and is not inclined to perform further by delivering the goods ordered. The majority judgment clearly contemplates this position as it recommends that criminal charges be laid. I do not disagree that criminal investigation into charges of Theft and/or Fraud may be appropriate but the unavoidable consequence of this particular stance is a contemplation that there is no intent to supply coupled with a parallel intent not to disgorge the funds already received. That being so there is no room for the situation where the legislation provides a business-like excuse such as stock shortages or incapacity, neither of which require intent.
44. In short, taking the order and subsequently the funds without supplying the goods does not necessarily trigger a contravention of section 47 as the majority judgment finds. There needs to be the explanation, for example "my own supplier is out of stock therefore I cannot supply you". As is clear from section 47(6), that excuse is itself conditional upon the person with whom the consumer contracted adequately carrying out ordinary or routine matters pertaining to his business.
45. In the circumstances my view is that the appropriate order should omit any reference to section 47 in paragraph 33.