

**IN THE NATIONAL CONSUMER TRIBUNAL
HELD IN CENTURION**

Case number: **NCT/ 251512/2022/75(1)(b)**

In the matter between:

QUEEN ANNA MAKHANYE

APPLICANT

And

DÉCOR LIFESTYLE CENTRE CC

RESPONDENT

Coram:

Mr S Hockey	-	Presiding Tribunal Member
Ms N Maseti	-	Tribunal Member
Dr M Peenze	-	Tribunal Member

Date of Hearing	-	09 May 2023
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Date of Judgment	-	16 May 2023
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JUDGMENT AND REASONS

THE PARTIES and REPRESENTATION

1. The applicant is Queen Anna Makhanye (the applicant), a consumer as defined in section 1 of the Consumer Protection Act, 68 of 2008 (the CPA). At the hearing, the applicant was represented by Mr Bakone Maloba, an attorney from GPI Hottie Attorneys.
2. The respondent is Décor Lifestyle Centre CC (the respondent), a supplier as defined in section 1 of the CPA. The respondent did not file an answering affidavit

in this matter and was not represented at the hearing, which proceeded in its absence.

TERMINOLOGY

3. A reference to a section in this judgment refers to a section of the Act.
4. A reference to a rule refers to the “Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal”¹ (the rules).

TYPE OF APPLICATION

5. The applicant referred this matter to the National Consumer Tribunal (the Tribunal) in terms of section 75(1)(b). The applicant first lodged her complaint with the National Consumer Commission (the NCC), who, after an assessment, concluded that the redress sought by the applicant could not be provided in terms of the CPA and that the NCC did not have jurisdiction to pursue a claim for compensation for damages as sought by the applicant from the respondent in terms of the CPA. The NCC accordingly issued a notice of non-referral.
6. In terms of sections 75(1)(b), if the NCC issued a notice of non-referral as it did in the present matter, the complainant may refer the matter directly to the Tribunal, with leave of the Tribunal. The Tribunal granted such leave on 2 March 2023.

CONSIDERATION OF THE EVIDENCE ON A DEFAULT BASIS

7. On 24 November 2022, the applicant filed the application with the Tribunal. The application was served on the respondent via e-mail. On 25 November 2022, the Tribunal’s Registrar issued a notice of filing to all the parties.

¹ Published in GN 789 in GG 34405 of 29 June 2007.

8. In terms of Rule 13 of the rules, the respondent had 15 business days to serve an answering affidavit and file it with the Tribunal's Registrar. However, the respondent failed to do so.
9. The applicant did not file an application for a default order in terms of rule 25(2).
10. On 6 April 2023, the Tribunal's Registrar issued a notice of set down to all the parties setting the matter down for hearing on a default basis due to the pleadings being closed.
11. On the hearing date, the Tribunal was satisfied that the notice of set down was adequately served on the respondent. The matter proceeded on a default basis.
12. Rule 13(5) provides that:

“Any fact or allegation in the application or referral not specifically denied or admitted in the answering affidavit, will be deemed to have been admitted.”

13. Therefore, in the absence of an answering affidavit filed by the respondent, the applicant's application and all the allegations contained therein are deemed to be admitted.
14. In addition to the applicant's founding affidavit, she also gave oral evidence which stands uncontroverted.

BACKGROUND

15. In January 2021, the applicant bought polished porcelain tiles for R152,000,00 from the respondent. The tiles were advertised as suitable for both floors and walls.
16. At all material times in the dealings with the respondent, the applicant dealt with a person called Marriam of the respondent. She told Marriam that she wanted a uniform look throughout her house, and for this reason, she bought the same tiles for the kitchen, bedrooms, bathrooms, walkways, and living rooms.
17. The tiles were delivered in January 2021 and installed in the applicant's newly built home during February and March 2021.

18. The applicant took occupation of her newly built home in July 2021. Within three months of occupancy, the tiles started losing their gloss and attracted dirt, which proved difficult to clean. This changed the aesthetics of the applicant's home as the tiles began to look matt instead of the glossy look that the applicant wanted.
19. On 15 November 2021, the applicant contacted Marriam and told her of the problems. Marriam and a technical person named Ridwaan from Malls Tiles, who is the supplier of the respondent, visited the applicant's home and brought with them some cleaning materials.
20. After Ridwaan inspected the tiles, he verbally stated that the tiles were indeed defective. He said he would write a report to the manufacturer and promised to get back to the respondent within three days of the site visit.
21. After following up with Marriam on several occasions, the applicant received a response that the manufacturer would not take responsibility for what they termed "optical hazing". The report the applicant received from the respondent further stated as follows:

"The problem highlighted is the normal haze/glaze which is seen in any PGVT polished tiles. As you are aware, PGVT polishing is done on the GLAZE, unlike the normal polished tile which is fully polished. The haze is aggravated when seen with the natural light falling on the tiles at an angle. The same floor will look different even when seen from a different position. Based on the information provided and the QC reports pertaining to the design, the factory is not in a position to see any issue in the tiles."

22. After researching the porcelain tile industry, the applicant contacted Cermalab Materials Testing Laboratory (Cermalab), who charged her R8 832.00 to test the tiles. The applicant had to have two tiles removed; one highly abraded and one not, for testing purposes. The applicant also obtained a technical data sheet of the tiles from the respondent, which was handed to Cermalab.
23. In the report dated 10 October 2022, Cermalab confirmed that the tiles were tested for:

- water absorption;
- Moh's scratch hardness; and
- PEI surface abrasion resistance.

24. The Cermalab report confirmed the test results as follows:

- The tiles have a water absorption average of 0,14%, which places them into ISO13006:2018 (E) Group BLa tiles (in agreement with the specification sheet);
- The tiles have Moh's scratch resistance 4 (low value in specification sheet);
- The tiles have PEI surface abrasion resistance of 600 revolutions before wear is first noted (Class 2) (below the minimum value in the specification sheet); and
- Class 2 tiles are suitable for the entire domestic area, where normal footwear is worn and where there is a possibility of a small amount of abrasive dirt being tracked indoors. These tiles are not suitable for use in kitchens and halls or stairs.

25. The applicant submits that the Cermalab report confirms her conclusion that the tiles were of inferior quality. The tiles were fine for a few months but started showing signs of defect within three months of occupying her home. Cermalab concluded that the tiles were class II. Marriam, however, assured her that the tiles were of the best quality and would support her in achieving the look she wanted for a home.

THE RELEVANT LEGAL PROVISIONS

26. The applicant argued that the respondent contravened sections 55(2)(a) and (b) and 56(2)(a). In terms of section 55(2)(a) and (b), every consumer has a right to receive goods that are reasonably suitable for the purpose for which they are generally intended and are of good quality, in good working order, and free of any defects. Subparagraph (c) further provides for such goods to be usable and durable for a reasonable period of time, having regard to the use to which they would normally be put and all the surrounding circumstances of their supply.

27. Section 56 deals with an implied warranty of quality, and subsection (2) states that within six months after delivery of any goods to a consumer, the consumer may

return the goods to the supplier without penalty and at the supplier's risk and expense if the goods fail to satisfy the requirements and standards contemplated in section 55. The supplier must then, at the election of the consumer, either repair or replace the failed, unsafe or defective goods or refund the consumer the price paid by the consumer for the goods.

28. In the present matter, the tiles were delivered to the applicant in January 2021. The applicant first complained about the condition of the tiles in November 2021. Therefore, more than six months have elapsed since the tiles were delivered, and the implied warranty, as provided for in section 56, is no longer applicable.
29. The applicant also alleged that Miriam knew what the purpose was for the use of the tiles, and she assured the applicant that the tiles would be suitable for the intended purpose. The tiles were advertised as suitable for both wall and floor areas. The tiles, however, proved unsuitable for certain areas of the home, as reported by Cermalab. Section 41, which deals with false, misleading, or deceptive representations, applies in these circumstances. This section provides, amongst others, that in relation to the marketing of goods or services, the supplier must not, by words or conduct, directly or indirectly express or imply a false, misleading, or deceptive representation concerning a material fact to a consumer.

EVALUATION

30. The applicant has given a detailed breakdown of the damages she allegedly suffered as a result of the alleged misrepresentation and defective tiles provided by the respondent. The total amount of damages so suffered is R695 372.00.
31. Since the implied warranty provided for in section 56 has expired, the Tribunal cannot make an order in this regard. Section 55, however, deals with the rights of a consumer to safe and good quality goods. The Tribunal finds that the tiles provided by the respondent were not reasonably suitable for the purpose for which they were intended. The respondent knew the tiles' purpose as the applicant informed Miriam that she wanted to use the tiles throughout her home, as she wanted a uniform and a glossy look. The tiles, however, lost their gloss within three months of the applicant occupying her home.

32. The Tribunal has considered whether the respondent's conduct constitutes prohibited conduct² in terms of the CPA. In doing so, the Tribunal is mindful of its wide-ranging powers to make appropriate orders in relation to prohibited conduct.³

33. The Tribunal is of the view that the respondent contravened the applicant's rights in section 55(1)(a), (b), and (c) in that the tiles proved not to be reasonably suitable for the purpose for which they were intended, are not of good quality, and proved not to be durable for a reasonable period of time. Consequently, the respondent engaged in prohibited conduct by supplying the tiles to the applicant.

34. Since Marriam assured the applicant that the tiles, which were advertised as suitable for both walls and floors, were of good quality, the Tribunal considered whether the respondent contravened section 41, which deals with false, misleading, or deceptive representations. Marriam, acting on behalf of the respondent, was told what the tiles should be used for and, therefore, would have known that they would be used in areas with high foot traffic. As reported by Cermalab, the tiles are unsuitable for certain areas of the house. The Tribunal, therefore, finds that the respondent contravened section 41, which provides that a supplier must not, by words or conduct –

- a) directly or indirectly express or imply a false, misleading, or deceptive representation concerning a material fact to a consumer;
- b) use exaggeration, innuendo, or ambiguity as to a material fact, or fail to disclose a material fact if that failure amounts to a deception; or
- c) failed to correct an apparent misapprehension on the part of the consumer, amounting to a false misleading or deceptive representation.

35. The transgression of section 41, as aforesaid, constitutes further prohibited conduct.

36. In terms of section 115(2)(b), a person who has instituted action for damages suffered as a result of prohibited conduct in a civil court, if such person is entitled to

² Prohibited conduct is defined in section 1 as meaning an act or omission in contravention of the Act.

³ See National Credit Regulator v Dacqup Finances CC trading as ABC Financial Services – Pinetown and Another (382/2021) [2022] ZACSA 104 (24 June 2022).

commence such action in a civil court, must file with the registrar or clerk of the court a notice from the chairperson of the Tribunal in the prescribed form –

“(i) certifying whether the conduct constituting the basis for the action has been found to be prohibited or required conduct in terms of [the CPA];

(ii) stating the date of the Tribunal’s finding, if any; and

(iii) setting out the section of [the CPA] in terms of which the Tribunal made its finding, if any.”

37. The certificate referred to in section 115(2)(b) is sufficient proof of its contents.⁴

ORDER

38. In the result, the Tribunal makes the following order:

38.1. The respondent has contravened sections 41(1)(a) and (b) and 55(2)(a) – (c) of the CPA.

38.2. The contraventions are declared to be prohibited conduct.

38.3. The applicant may approach the Chairperson of the Tribunal for a certificate in terms of section 115(2)(b) of the CPA to claim damages in a civil court.

38.4. There is no order as to costs.

[SIGNED]

S Hockey (Presiding Tribunal member)

Tribunal members Ms N Maseti and Dr M Peenze concur.

⁴ Section 115(3).

Authorised for issue by The National Consumer Tribunal

National Consumer Tribunal

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