

SOUTH AFRICA / JUDGMENT

**Penzee v JD Services (PTY) Ltd, JDL
Group (PTY) Ltd (GCC 11/2021)
[2021] ZACONAF 5 (17 October 2021)**
[2021] ZACONAF 5

COURT

Consumer Affairs Court

BEFORE

Zandile Mpungose, P Samuels, Phukubje

CASE / FILE NUMBER

GCC 11/2021

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IN

THE CONSUMER AFFAIRS COURT FOR THE

PROVINCE OF GAUTENG

HELD AT JOHANNESBURG

CASE NO: GCC 11/2021

In the matter

between:

DR

MARIA CLAUDINA PENZEE

Complainant/Plaintiff

And

JD

SERVICES (Pty) Ltd, JDL Group (Pty) Ltd

Respondent/Defendant

JUDGMENT

1. This is an action in terms of which the Plaintiff seeks reimbursement and compensation for loss resulting from the Defendant's failure to exercise due care over property belonging to the Complainant who is the Plaintiff herein, and interest thereon, as set out in the Particulars of Claim to the Summons.
2. A summons initiating proceedings before the Gauteng Consumer Affairs Court in terms of section 18(1) and Regulation 14(1) of the Consumer Affairs (Unfair Business Practices) Act No. 7, 1996 was served on the Defendant on the 24 June 2021.

3. The Defendant failed to appear before the Gauteng Consumer Affairs Court , despite having signed for the service of the summons and the notices of set down, initially when it was set down for the 21 st September 2021 and for the 6th October 2021, which is the date the matter was heard in full.
4. At the hearing of this matter on 06 October 2021, the Plaintiff was represented by the Consumer Protector. The Defendant was not in attendance even though they had been served with the summons and notice of set down and had also attended mediation with the Consumer Protector. represented by an Attorney and an Advocate.

The facts

5. The Plaintiff led evidence under oath as follows:

5.1 The Plaintiff entered into three service contracts, the initial one on the 5th November 2019 and two subsequent ones on or about 15/16 November 2019 through quotations for additional services required and both those quotations were accepted and paid for. The service contracts were for installation of artificial grass, renovation of the swimming pool and landscaping, and thereafter the contract and quotation was varied for a different marbelite product than the one initially quoted, as well as a supreme quality artificial grass. The quotation for the contract variation with supreme grass was an amount of R 296 635.51.

5.2 The Plaintiff had also negotiated with the Defendant to do the connection and installation of a Jojo tank at no extra charge. The Plaintiff was charged for the roof installation on the Jojo tank an amount of R 14 211.70, which was paid on the 15th November 2019. The Plaintiff had paid an amount of R231 262.32 as a deposit towards the main contract. On the 16 November 2019 the Plaintiffs Personal Assistant erroneously paid yet again the R 14 211.70 quoted and already paid in respect of roof installation for the jojo tank. This was at a time when the Plaintiff was in hospital for a surgical procedure. The Plaintiff notified the Defendant about the double payment but he refused to refund the moneys paid, in error.

5.3 An amount of R236 68.26 was paid into the Defendant's account as at the 28th November 2019. Despite the fact that there were delays with the carrying out the services requested and as Plaintiff trusted the Defendant she entered into two further agreements with the Defendant. One was for installation of gate rail which was never executed and that contract was cancelled by mutual agreement and for installation of an arch. In respect of the installation of the gate rail Plaintiff was quoted an amount of R 5221.00 which was paid on or about 30 November 2019 and for installation of an arch an amount of R29 641.25 was paid on 28 January 2020. The contract for the arch installation was cancelled on the same day after payment had been made.

5.4 On the 26 January 2020 an amount of R 64 100.00 was deposited in the Defendant's account which took the moneys paid by the Complainant until that date to an amount of R 300 106.00 in total. The installation of an arch contract was thereafter cancelled on the 28 January 2020, which was still within the cooling off period as provided by the Consumer Protection Act.

5.5 All in all the Plaintiff had three contracts with the Defendant the main/ initial contract, installation of gate rail contract and installation of an arch contract. The two latter contracts were subsequently cancelled at the instance of the Plaintiff. The Plaintiff had considered the Defendant to be a professional landscaper, irrigation systems specialist and was surprised after the installations when the irrigation system wouldn't work properly and the water couldn't flow within the installations. At one point her property was left without water access for a few days, in an attempt to remedy the situation Plaintiff was advised to buy a switch and other additional equipment. She bought the switch for R13 190.50 and additional equipment for approximately R 60 000 00 on or about 29th January 2020.

5.6 The contracts for installation of an arch and the gate rail were subsequently cancelled in January 2020 and both the arch and gate rail installation moneys already paid were not refunded

5.7 During the month of March 2020, the Plaintiff received an invoice with work already covered (duplication), she then scrutinized all the quotations and invoices. She decided to get services of a quantity surveyor to measure the extent of the space where the grass had to be installed and was advised that the square meterage in the quotation is much bigger than the actual size where the grass installation had to be done and based on that Plaintiff that she had been over-quoted and the deposit paid was based on the incorrect or exaggerated measurements. She further realized that the number of tiles ordered and paid for versus the number actually delivered was not tallying. There were also tiles damaged and damage to the garden for which the Defendant offered to pay.

5.8 The Defendant offered to refund the Plaintiff an amount of R5221.00 paid in respect of the gate rail installation.

5.9 The Consumer Protector made submissions that there was a facilitated mediation that was initiated in terms of section 8 of the Consumer Affairs (Unfair Business Practices) Act No. 7 of 1996. Both the Plaintiff and the Defendant attended the mediation hearing, at the mediation the Defendant brought with him an Attorney and an Advocate to represent him. Certain concessions were made by the Defendant, however, no undertaking was given on when the all the moneys (for re-imburement for work not done, damage to the property and for over quotation) were going to be paid back to the Plaintiff would be paid.

6. During the mediation all the amounts paid by the Plaintiff to the Defendant for specific services were acknowledged and the Defendant further made undertakings to refund the Plaintiff for the gate rail and arch installation and further offered to pay an amount of R 5000 00 to the Complainant towards the grass and tiles damaged during the time the Defendant and his workers were on site.
7. The Defendant further acknowledged that the Plaintiffs wheelbarrow could have been removed by his employees during the period when they were working on the project site. It was mentioned by the defendant that in terms of the calculation of the extent of the site where grass installations had to be carried out, Defendant had said their calculations were based on meters not square-meters and thus did not acknowledge or concede that they had

over-quoted the Plaintiff. The Plaintiff gave evidence under oath that during the mediation the Defendant had acknowledged owing the Plaintiff certain moneys for incomplete work and for orders not completed, namely the gate rail and the arch. The Defendant, represented by Mr Anthony Ferreira acknowledged his indebtedness to the Complainant however concluded by saying that the Defendant's business was going bankrupt and it will be liquidated. During the mediation hearing there were no disputes on the facts, save for the manner in which the area for grass installation was measured, but the Defendant had said that they cannot afford to pay the Complainant back.

8.1 The Consumer Protector, on behalf of the Plaintiff, requested the members of the Consumer Court to make an order as follows

Refund of the over-quoted amounts in respect of grass installations and the pool tiling;

Payment of the R 5000 00 to cover damage done to Plaintiffs property;

Refund for moneys paid towards purchase and installation of an arch and a gate rail; and

Return of the Plaintiffs wheelbarrow removed from Plaintiffs property.

The hearing was initially set down for the 24th September 2021 but was postponed at the instance of the Plaintiff.

The hearing resumed on 06 October 2021.

The Defendant despite due service of the summons and notice of set down, failed to attend the proceedings.

The Plaintiff furnished the Tribunal with copies of deposit slips and bank transfers of moneys paid into the Defendant's account in respect of the three service contracts entered into.

Section 54 of the Consumer Protection Act, no. 68 of 2008 (CPA) provides as follows

Consumer rights to demand quality service :

- (1) When a supplier undertakes to perform any services for or on behalf of a consumer, the consumer has a right to —
 - (a) the timely performance and completion of those services, and timely notice of any unavoidable delay in the performance of the services;
 - (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

- (d) the return of any property or control over any property of the consumer in at least as good a condition as it was when the consumer made it available to the supplier for the purpose of performing such services, having regard

to the circumstances of the supply, and any specific criteria or conditions agreed between the supplier and the consumer before or during the performance of the services.

- (2) If a supplier fails to perform a service to the standards contemplated in subsection (1), the consumer may require the supplier to either—
 - (a) Remedy any defect in the quality of the services performed or goods supplied; or
 - (b) Refund to the consumer a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure.

From the evidence presented, the members of this court came to the following

conclusion

- (a) The Consumer Protector, had employed all reasonable efforts to ensure that the Defendant is notified in advance of the pending Court sitting, despite due service and the Defendant having signed for the notice of set down upon service, in terms of section 18(1) and Regulation 14(1) of the Consumer Affairs (Unfair Business Practices) Act no. 7 of 1996.
- (b) In the circumstances, it was judicious to proceed with the hearing in the absence of the Defendant.
- (c) The Defendant is in contravention of section 54(1) of the Consumer Protection Act, no 68 of 2008 in that in respect of the installation order for the gate rail and the arch in that no services were rendered in terms of the agreements entered into on or about 30 November 2019 and 28 January 2020 respectively, when the quotations were accepted and paid.
- (d) The Defendant is in contravention of section 54 (1) in respect of the performance in the installation of the marbelite in the pool as pad of pool renovations and tiling on the pool as well as installation of the grass around the pool area.
- (e) In view whereof, the Complainant is, in terms of section 54(2) of the aforementioned Act, entitled to a refund in full of the moneys paid for the arch and the gate rail. The Complainant is further entitled to a refund of the payment made for the tiles that were delivered whilst broken as well as for the refund of the over-payment made for the installation of the grass as per the quotation versus the actual size that should have been quoted
- (f) The Defendant has engaged in unfair business practice as defined in terms of the Unfair Business Practices Act No. 7 of 1996.

- (g) The Defendant has engaged in a prohibited conduct as defined in terms of section 1 of the Consumer Protection Act 68 of 2008.
- (h) The Consumer Court does not have jurisdiction , in terms of the Consumer Protection Act, to make a decision on the request for return of the wheelbarrow and/or reimbursement of an amount of R400.00 paid by the Plaintiff in replacing the wheelbarrow allegedly removed by the Defendant's employees from the Plaintiffs property.
- (i) The Defendant is thus ordered to pay the Plaintiff the following .

- moneys paid in respect of the arch not installed amounting to R 29 641.25;
- moneys paid in respect of the gate rail which was not installed , amounting to R 5221.00;
- moneys pledged by the Defendant as payment for the damage to the Complainant's grass amounting to R 5000.00;

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moneys overpaid for the grass installation and for the purpose of tiles which were delivered in a sub-standard form as well as the Jojo tank roof installation which was paid for twice, in error, and not to the satisfaction of the Complainant amounting to R92 440.45 less R930.00 in respect of the wheelbarrow, total amounts to R91 510.45

- interest at the rate prescribed rate of interest on the amount of R 131 372.70 to the Complainant, calculated from date of judgment until date of payment.

ORDERED as such at JOHANNESBURG on 17 October 2021.

Zandile Mpungose

CHAIRPERSON

MEMBERS P Samuels and Phukubje concurred

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