



THE PROVINCE OF MPUMALANGA  
DIE PROVINSIE MPUMALANGA

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## GENERAL NOTICES • ALGEMENE KENNISGEWINGS

## NOTICE 172 OF 2016

IN THE CONSUMER AFFAIRS COURT FOR THE PROVINCE OF MPUMALANGA HELD AT  
NELSPRUIT

CASE NO: MPCC58/01/06/12

In the matter between

CHRIS AND HELENE ESTERHUIZEN

and

NELCRETE CC



COMPLAINANT

RESPONDENT

Quoram: NKOSI VRS(CHAIR); NCONGWANE M.M; MATSANE B.L; SWART M and  
SHABANGU N.R

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JUDGMENT

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1. THE PARTIES AND THEIR REPRESENTATION

- 1.1 The Complainants are adult persons residing at STAND NUMBER 127 SHEBA ROAD, BARBERTON, MPUMALANGA PROVINCE, for purposes of this case they are "consumers": as defined in terms of section 2(1) (a) of the Mpumalanga Consumer Affairs Act, Act 6 of 1998.
- 1.2 Complainants appeared in person assisted and represented, in terms of section 12(1) of the Mpumalanga Consumer Affairs Act, (OpCit) by the Consumer Protector for the Mpumalanga Province, Mr Nation Nkosi.
- 1.3 The Respondent is NELCRETE CC trading as NELCRETE PRECAST WALLS, a Close Cooperation incorporated and registered in South Africa as CK2002/030731/23, with its business premises situated at FARM GOEDEHOOP, NELSPRUIT, MPUMALANGA PROVINCE.
- 1.4 The Respondent was represented by MR MOLLER LOUW the owner, who also testified as a witness.

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- 1.5 Both parties are residents of the Mpumalanga Province and hence the matter fall within the jurisdiction and authority of this Court. But more than that, jurisdiction of this Court on this matter is also founded on the *rei gestae* or cause of action which arose wholly in Mpumalanga Province.

**2. THE COMPLAINANT'S CLAIM**

1. The complainant's claimed through the assistance of the papers/summons drawn on their behalf and presented by the Consumer Protector, Mr Nation Nkosi, claims in summary that the Respondent engaged in unfair business practices ("UBP"). The UBP is said to be that the Respondent failed, refused or neglected to replace or repair the concrete walls panels erected for the complainant at the costs of R22 050.
2. The Complainant claimed that in engaging in the conduct above, the Respondent had committed unfair business practices towards them as defined in section 1 of the Mpumalanga Consumer Affairs Act No.6 of 1998.
3. The issue to be determined by this Court was then whether the Respondent did indeed commit an unfair business practices as defined (*ibid*)

**3. THE RESPONDENT'S DEFENCE**

1. From the time of the investigation by the Office of the Consumer Protector to the time the matter was heard in this court, the assertions of the Respondent were that -
  - (a) The stones supplied by "Road Stones" which were used to manufacture the pre-cast walls were the cause of the "rust spots" on the said walls.
  - (b) The Respondent was not going to replace nor repair the walls, since they were manufactured out of the stones which are a product of nature and could not be held responsible for an "Act of God".

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## 4. SURVEY OF THE FACTS

1. It was common cause that
  - (a) The Complainant entered into a contract of sale with the Respondent for the purchase and erection of 52,5m x 1,8m high pre-cast walls for an amount of R22 050.
  - (b) The Complainant paid R22 050 cash to the Respondent, who thereafter erected the pre-cast walls at the complainant's residence.
  - (c) After nine months of the erection of the said walls, they all developed rust spots and the Respondent was accordingly informed thereof.
2. The Respondent in his testimony confirmed the assertions of the Complainants that the concrete walls developed "rust spots".
3. The Respondent after becoming aware of the rust spots in January 2011 took a sample of the panels for a laboratory test to establish the cause. The results were that the stones used to manufacture the walls was the probable cause of the rust spots. This was also confirmed by the Concrete Institute of South Africa.
4. The Respondent contented that there was nothing wrong with the manufacturing of the concrete walls as the problem was with the stones that came from nature and cannot be humanly controlled.
5. Members raised the question of what steps did the Respondent took to recoup his loss as a results of the problem of the stones supplied to him. The Respondent indicated that he tried legal action against the supplier of the stones and did not continue with the said action as a results of the costs to be incurred and was also discouraged by the long period involved in civil litigation. He indicated to the court that he was also a victim in this particular case.
6. When asked if he deems it fair for the complainant to loose money as a results of the above, the Respondent answered that it is not fair but there is nothing that he could do as he was also a victim.

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## 6. THE LAW ON THE MATTER

1. In terms of section 1 of the Mpumalanga Consumer Affairs Act, Act 6 of 1998, "Unfair business practices" is defined as:  
*"any business practice which, directly or indirectly has; or is likely to have the effect of unfairly affecting any consumer."*
2. "Business Practice", on the other hand is defined, to include:  
*" any act or omission in connection with business on the part of any person, whether acting independently or in concert with any other person".*
3. Section one of this Act further defines "this Act" as including the regulations published under this Act.
4. Section 2(1) of the Act defines a consumer as:  
*"any natural person to whom any commodity is offered, supplied or made available where that person does not intend to apply the commodity for the purpose of resale, lease the provision of service or the manufacture of goods for gain"*
5. This court is empowered to adjudicate over this matter in terms of section 17 of the Mpumalanga Consumer Affairs Act No.6 of 1998. Section 22 of the said Act empowers this Court with regard to the types of orders that this court can make.
6. Article 7 in Schedule 2 [per section 121(3)] of the CPA, deems the CPA applicable to the Mpumalanga Province as well, and by implication this Court.
7. Section 55(2)(b) of the CPA expressly provides that:  
*"Except to the extent contemplated in subsection (6), every consumer has a right to receive goods that-"*  
*"are of good quality, in good working order and free of any defects."*

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- 8 Subsection 6 provides that "subsection (2) (a) and (b) do not apply to a transaction if the consumer
- (a) has been expressly informed that particular goods were offered in a specific condition; and
  - (b) has expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition.

## ANALYSIS OF THE FACTS AND ARGUMENTS

1. Based on the above survey of facts and the law, it is clear that:-
  - (a) Quality is a minimum requirement a Consumer can insist upon and no longer an extra given by the respondent.
  - (b) The Respondent acknowledged that the defect existed in the goods at the time of delivery or at the time when the goods were supplied to the complainants.
  - (c) The Respondent in his testimony agreed that the stones could have been tested and were tested after the problem was identified.
  - (d) The Respondent referred to an "Act of God. If the stones were tested an "Act of God" could have been prevented.
  - (e) Fundamental consumer rights as outlined by section 55(2)(b) of the CPA were clearly not observed by the Respondent, as the latter clearly violated the said fundamental right.

## PRAYER OF THE PARTIES

1. The Complainants in their papers prayed for an order for the replacement of the rusted blades.
2. On the other hand, the other prayer of the Respondent, even though not stated in so many words was for this court to dismiss the claim of the complainant.
3. There was no application as to costs.

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**ORDER**

It is ordered that the Respondent replace all the "rusted blades" on or before the 30<sup>th</sup> September 2012 or alternatively refund the complainant the sum of R22 050 with an interest of 15,5% p.a from date of judgment



MR VRS NKOSI: CHAIRPERSON

MPUMALANGA CONSUMER AFFAIRS COURT





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