

**IN THE NATIONAL CONSUMER TRIBUNAL  
HELD ONLINE VIA TEAMS**

Case Number: **NCT/219112/2022/75(1)(b)**

In the matter between:

**KRISHNEE NAICKER**

**APPLICANT**

and

**HYUNDAI AUTOMOTIVE SOUTH AFRICA**

**T/A HYUNDAI UMHLANGA**

**RESPONDENT**

Coram:

Prof K Moodaliyar - Presiding Tribunal Member

Adv C. Sassman - Tribunal Member

Mr CJ Ntsoane - Tribunal Member

Date of Hearing: 23 November 2022

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**JUDGMENT AND REASONS**

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**THE PARTIES**

1. The Applicant is Krishnee Naicker, an adult female person ("the Applicant" or "Ms Naicker"). The Applicant is a consumer as defined in section 1 of the Consumer Protection Act 68 of 2008 ("the CPA" or "the Act"). At the hearing, the Applicant represented herself.
2. The Respondent is Hyundai Automotive SA (Pty) Ltd, trading as Hyundai Umhlanga, Andre Dreyer Motors (Pty) Ltd, located in Umhlanga ("Hyundai" or "the Respondent"). The Respondent was represented by Adv Shaun McTurk, instructed by Remon Gerber Attorneys.

## APPLICATION TYPE

3. This is an application in terms of Section 75(1)(b) of the Consumer Protection Act 68 of 2008. In this application, the Applicant, with leave granted by the Tribunal, seeks redress against the Respondent. The Applicant alleges breach of the Act on the basis that the Respondent allegedly failed to comply with the Applicant's request for a repair of her vehicle or a refund of the purchase price in accordance with Sections 55 and 56 of the Act.

## BACKGROUND

4. Ms Naicker purchased a pre-owned 2017 model Hyundai Accent 1.6 GLS vehicle ("the vehicle") from Hyundai on 11 June 2019 for R203 214.99 in cash. It had 22 604 km on the odometer. On 22 July 2019, she reported problems with the vehicle, such as minor dents and scratches, the radio clock not functioning, rubber seal problems, and humming noises from the wheels. The vehicle was returned to Hyundai on several occasions over the years. Some of the problems were rectified, but not all. Despite Hyundai's attempts to rectify the humming noise, it remained, and in January 2020, Ms Naicker reported a vibration in the pedals while driving. By September 2020, the humming and vibration problem was ongoing. Ms Naicker asked Hyundai to replace the vehicle.
5. In an email dated 2 August 2019, Hyundai offered to refund the purchase price to her. There is no record of Ms Naicker responding to this email. In October 2020, Hyundai offered to purchase the vehicle back from her for the trade value of R174 900,00.
6. Ms Naicker lodged a complaint with the Motor Industry Ombudsman of South Africa ("MIOSA") in December 2020. MIOSA issued a letter dated 8 June 2021 stating that it could not recommend replacing the vehicle. The problem with the vehicle occurred outside the six-month period. The supplier had offered to refund the purchase price in an email dated 2 August 2019. She lodged a complaint with the National Consumer Commission ("the NCC") on 13 June 2021. The NCC issued a Notice of Non-referral dated 29 October 2021.
7. Ms Naicker lodged the complete application for leave to refer the matter to the Tribunal in terms of section 75(1)(b) of the CPA on 21 February 2022. She also filed an application to condone the late filing of the application. Condonation for the late filing was granted in a written judgment dated 11 April 2022.
8. A Notice of Filing by the Tribunal was issued on 8 June 2022.

## APPLICABLE SECTIONS OF THE ACT

9. Section 75 Referral to Tribunal, reads as follows:

*“If the Commission issues notice of non-referral in response to a complaint, other than on grounds contemplated in Section 116, the complainant concerned may refer the matter directly to –*

*(a) .....*

*(b) the Tribunal, with leave of the Tribunal”*

10. Section 55 deals with the Consumer’s rights to safe, good quality goods

*Subsection 55(2) gives the following rights to the consumers that they a right to receive goods:*

*(a) are reasonably suitable for the purposes for which they are generally intended;*

*(b) are of good quality, in good working order, and free of any defects;*

*(c) will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply; and*

*(d) comply with any applicable standards set under the Standards Act, Act 29 of 1993, or any other public regulation.*

11. Section 56 deals with an Implied warranty of quality

*(1) In any transaction or agreement pertaining to the supply of goods to a consumer there is an implied provision that producer or importer, the distributor, and the retailer each warrant that the goods comply with the requirements and standards contemplated in section 55, except to the extent that those goods have been altered contrary to the instructions, or after leaving the control, of the producer or importer, a distributor or the retailer, as the case may be.*

*(2) Within six months after the delivery of 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, and the supplier must at the direction of the Consumer, either –*

*(a) repair or replace the failed, unsafe or defective goods; or*

*(b) refund to the Consumer the price paid by the Consumer, for the goods.*

## THE HEARING

### Points in Limine

12. At the hearing, the Respondent raised a few points *in limine*. First, it questioned the application of Section 56 in this matter in that the Applicant had not acted within the six-month period, alternatively

elected the

warranty repair, and accepted such repair. Any additional complaints were not within the six-month period, as found by the investigation conducted by the NCC.

13. With respect to any goods, component of any goods, or services (Section 53 (1)), the Respondent stated that 'defect' means - any material imperfection in the manufacture of the goods or components, or in the performance of the services, that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances. 'Failure' means the inability of the goods to perform in the intended manner or to the intended effect; 'hazard' means a characteristic that has been identified as, or declared to be, a hazard in terms of any other law; or presents a significant risk of personal injury to any person, or damage to property, when the goods are utilised; and 'unsafe' means that, due to a characteristic, failure, defect or hazard, particular goods present an extreme risk of personal injury or property damage to the Consumer or to other persons.
14. The Respondent argued that the vehicle has not displayed any of these requirements and that what the Applicant complained about and considered to be defects are purely cosmetic.
15. Having heard arguments on the points *in limine*, the Tribunal decided to proceed with hearing the parties' submissions on the merits.

### **The merits**

16. The Applicant stated that the humming noise in the vehicle started within the first week of purchase, and on 25 June 2019, she sent an email listing the possible defects of the vehicle to the Respondent. This was done within six months of purchase, and therefore, her complaint is within time in accordance with the CPA.
17. Despite the alleged defects, the Applicant continued to use the vehicle.
18. It is common cause that the Respondent offered to refund her for her vehicle and replace it with another. However, Ms Naicker insisted that she did not want the money. She wanted her vehicle repaired or replaced with the exact specifications of her current vehicle.
19. Ms Naicker felt that, as a customer, she should not be penalised by being offered a lower amount for her vehicle.

20. In reply, the Respondent argued that the 'defect' the Applicant complained of was not a defect as defined in the CPA. Section 53(1)(a) of the CPA states that the imperfection must be material; the defect must render the goods less acceptable as a person would be reasonably entitled to expect, and the defect must render the goods impractical that a reasonable person expects. The Respondent further argued that the defect is an objective test, not one that questions whether the individual thinks it is a defect.
21. There is a lack of evidence before the Tribunal regarding the defect.
22. Further, the Applicant has continued to use the vehicle even though she states that she thought it was unsafe to drive.
23. The Applicant requested a replacement vehicle with the same specifications as her current vehicle. The Respondent stated that this would not be possible as the vehicle was a second-hand vehicle with certain characteristics, and therefore finding a vehicle with the exact specifications would not be possible.
24. It is understood that the dealer principal informed the Applicant that the wheel bearings needed to be changed. At the time, the vehicle would have been out of warranty. It is at this time that the Applicant apparently requested a replacement vehicle.
25. In the premise, the Respondents submit that the Applicant is not entitled to the relief sought in terms of the Act. The Respondents ask that the Tribunal dismiss the application.

### **ISSUES TO BE DECIDED**

26. The Tribunal must decide whether the Applicant's vehicle is defective and whether she is entitled to a replacement vehicle.

### **CONSIDERATION OF THE MERITS**

27. The Applicant conceded that many of the defects complained of were cosmetic. Although she felt it was not safe for her daughter to drive the vehicle, the vehicle had been in use for at least 60 000km. The Applicant had not provided the Tribunal with evidence that the vehicle was unsafe or that there was an extreme personal risk in operating the vehicle. The vehicle had been in use and had not had any breakdowns during that time, as she had feared.

28. There was no evidentiary report or expert to testify whether the vehicle was defective as per the CPA.

29. The Applicant may have been unhappy with the vehicle as it did not meet her expectations. However, there is no evidence of any material defect.

## ORDER

30. Accordingly, for the reasons set out above, the Tribunal makes the following order:

30.1 The application is dismissed; and

30.2 There is no costs order.

DATED ON THIS THE 20<sup>th</sup> DAY OF DECEMBER 2022.

*(signed)*

**K MOODALIYAR**  
**PRESIDING MEMBER**



Mr CJ Ntsoane (Tribunal Member) and Adv C Sassman (Tribunal Member) concur.