

IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: **NCT/178924/2021/75(1)(b)**

In the matter between:

ARVIN SAHADEO

APPLICANT

And

HYUNDAI AUTOMOTIVE SOUTH AFRICA (PTY) LTD T/A

RESPONDENT

HYUNDAI ETHEKWINI

Coram

Ms. P A Beck - Presiding Tribunal Member

Ms. D Terblanche - Tribunal Member

Mr. F Sibanda - Tribunal Member

Date of Hearing - 24 October 2022

Date of Judgment - 28 October 2022

JUDGMENT AND REASONS

THE APPLICANT

1. The Applicant in this matter is Arvin Sahadeo, a major male ("Mr Sahadeo" or "the applicant") who resides in Durban, Kwazulu Natal. At the hearing, the applicant was represented by Advocate Jaipal, instructed by attorneys Nolan Naiker & Co.

2. The applicant is a consumer in terms of the definition accorded to a 'consumer' under the Consumer Protection Act, 2008 ("the CPA").¹

THE RESPONDENT

3. The Respondent is Hyundai Automotive South Africa (Pty) Ltd, trading as Hyundai Ethekwini ("the respondent"), duly incorporated under the company laws of the Republic of South Africa, whose principal business address is situated at 189 Anton Lembede Street, Durban KwaZulu-Natal. The respondent is a dealer and supplier of motor vehicles to members of the public.
4. The respondent was represented by Adv. Shaun McTurk, instructed by attorneys Remon Gerber Incorporated.

APPLICATION TYPE AND RELIEF SOUGHT

5. The applicant makes this application in terms of section 75(1)(b) of the CPA. That section provides that if the National Consumer Commission ("the NCC") issues a notice of non-referral in response to a complaint, the complainant may refer the matter directly to the Tribunal, with the leave of the Tribunal.
6. The application for leave to refer the matter directly to the Tribunal was heard by a single member of the Tribunal in accordance with section 75(5)(b) of the CPA², and on 15 December 2021, leave was duly granted to the applicant.
7. On 16 May 2022, the Tribunal heard the argument on the *points in imine* raised by the respondent. In a judgment dated 24 May 2022, the Tribunal dismissed the respondent's *points in limine*.
8. This judgment concerns the merits of the matter.

¹ 'consumer' in respect of any particular goods or services means-

(a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business;
(b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3).

² As contemplated in subsection(1)(b).

9. The applicant initially sought an order for the following relief:
 - 9.1 that the “deal” is cancelled; and
 - 9.2 compensation as the applicant should not “be paying full price” for a defective vehicle.

10. At the hearing, the applicant narrowed the relief to an order that the Chairperson of the Tribunal issues a notice in terms of section 115(2)(b) of the CPA for the applicant to institute a claim in a civil court to recover the damages he alleges he suffered arising out of the purchase of the vehicle.

11. The Tribunal clarified to the applicant that to grant the order sought, the Tribunal must decide whether the respondent engaged in prohibited conduct, by selling the applicant a defective vehicle as defined in the CPA in contravention of section 56 read with section 55 of the CPA.

TERMINOLOGY

12. A section in this judgment refers to a section in the CPA.

THE COMMON CAUSE AND UNDISPUTED FACTS

13. At the hearing of the matter, the parties confirmed that the material facts determining this application were common cause and therefore not disputed by the parties. At issue was the respective parties’ interpretation and application of the law to the common cause facts. The Tribunal sets these facts out below.

14. On 14 June 2018, the applicant purchased a silver motor vehicle, a Hyundai Creta 1.6l, a sport utility vehicle, (“the SUV”) from the respondent for R329 000.00 plus extras and a value-added product totalling R359 794.41 inclusive of VAT. The transaction was financed by the Motor Finance Corporation.

15. The following day, the applicant complained to the respondent that the gap on either side of the vehicle’s boot lid was unequal and amounted to a defect.

16. On 19 July 2018, following negotiations between the parties, the respondent replaced the initial vehicle purchased by the applicant, with another new Hyundai Creta 1.6l motor vehicle (“the replacement vehicle”). The replacement vehicle was sold with a 7-year or 200 000km manufacturer’s warranty, whichever is earlier.
17. The merits of this matter pertain to the replacement vehicle.
18. According to the applicant, the replacement vehicle also had a non-aligned boot lid, but this defect was not as noticeable because the replacement vehicle was white in colour. The applicant informed the respondent of the defect pertaining to the non-alignment of the vehicle’s boot lid and that the replacement vehicle was further fitted with a used radio. He was advised by the respondent that the complaint would be escalated. The respondent replaced the used radio with a new one and while doing so the respondent’s employees damaged the dashboard of the replacement vehicle.
19. A few months later, the applicant took the replacement vehicle to the respondent for a service because the mileage had reached 15000 kilometres. The applicant, on that occasion, raised various issues with the respondent’s employees about the replacement vehicle. This escalated into an argument. The applicant left the service centre and sent the dealer principal, Bradley Naidoo (“Naidoo”), an e-mail about this incident. Naidoo’s response was that the respondent did not want to service the applicant’s vehicle and that the applicant should take his vehicle elsewhere for a service. Later, in a meeting with Naidoo, Naidoo undertook to replace the replacement vehicle with a similar vehicle but later informed the applicant that he was instructed not to involve himself in the matter because the matter was a legal issue.
20. The applicant alleges that the replacement vehicle is defective and of inferior quality because the manufacturer had poorly aligned the vehicle’s body parts, specifically the boot lid. Approximately a year after receiving the replacement vehicle, on 19 April 2019, the applicant had the vehicle assessed by Durban Central Panel Beaters, a Hyundai-approved panel beater. According to the report of Durban Central, the following faults were found in the vehicle:
 - 20.1 the tailgate gaps to the dome panel and both rear fenders were not aligned;
 - 20.2 the right rear tail lamp had small chips along the top edge;
 - 20.3 the left rear fender had two dents on it and rust on the paint work;

- 20.4 on opening the tailgate, along the dome panel re-inforce, it had little or no paint;
- 20.5 the bonnet was misaligned and full of dust in the paint work; and
- 20.6 both rear fenders were misaligned with the bonnet and the windscreen post beadings.
21. On 19 July 2018, the applicant referred the matter to the Motor Industry Ombudsman of South Africa (“the MIOSA”). On 3 April 2019, the MIOSA report indicated that:
- 21.1 the replacement motor vehicle was inspected by an approved Hyundai Autobody Centre who confirmed that the vehicle was within factory specifications; and
- 21.2 the MIOSA did not support the applicant’s expectations to cancel the transaction.
22. On 3 April 2019, the MIOSA issued a letter to the applicant wherein the MIOSA recommended that the respondent, with the assistance of Hyundai South Africa, have the vehicle booked and assessed for possible repairs, within 15 days, if required.
23. On 23 June 2020, the respondent undertook to comply with the MIOSA recommendation and commenced on 1 July 2020 with repairing the vehicle. The respondent offered the applicant a courtesy vehicle but refused to pay any depreciation costs claimed by the applicant. The parties were unable to resolve this dispute.
24. On 7 May 2019 the applicant lodged a complaint with the NCC. The NCC’s investigation report,³ prepared by inspector AA Mange, indicated as follows:
- 24.1 the case of *Georgios Vouvoukis v Queen Ace CC trading as Ace Motors* wherein Lordship Pickering indicated that a latent defect was not of such a serious nature that a reasonable purchaser in the position of the plaintiff would not have entered into the sale;
- 24.2 the NCC was of the view that the defects complained about by the applicant were not material and not a defect as contemplated in section 53; and
- 24.3 the recourse of cancellation of the transactions is disproportionate to the defects complained about.
25. On 21 February 2020, the NCC issued a notice of non-referral stating that the applicant did not allege facts constituting grounds for a remedy under the CPA.

³ NCC investigation report Pg 35-50 of the bundle.

26. On 17 February 2021, the applicant approached the Tribunal by filing an application for leave to refer the complaint directly to the Tribunal. The Tribunal heard the matter on an unopposed basis and on 15 December 2021 issued a judgment⁴ granting the applicant leave to refer the matter directly to the Tribunal in terms of section 75(1)(b).

ANALYSIS

Relevant legislative provisions

27. Below, we consider the sections of the CPA that the applicant relies upon in so far as it is applicable to this case. Chapter 2 of the CPA concerns fundamental consumer rights. It is convenient to set out the relevant sections in chapter 2 that determine this application.

Definition

Section 53: Meaning of "defect."

28. In the context of goods, section 53 (1)(a) defines a "defect" as:
- (i) "any material imperfection in the manufacture of the goods or components, or performance of the services, that renders the goods or results of the services less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or
 - (ii) 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."

Section 54: Consumer's rights to demand quality service

29. Section 54 (2) provides as follows: "If a supplier fails to perform a service to the standards contemplated in subsection
- (1) the consumer may require the supplier to either—
 - (a)
 - (b) refund to the consumer a reasonable portion of the price paid for the service performed and goods supplied, having regard to the extent of the failure". I

⁴ Tribunal judgment and reasons dated 15 April 2019, on page 72 of the case record.

Section 55: Consumer's right to safe, good quality goods

30. Section 55 (2)(a), (b) and (c) respectively give a consumer the right to receive goods that are reasonably suitable for their intended purpose; are of good quality, in good working order, and free of defects; and usable and durable for their normal use for a reasonable time.
31. Section 55(2)(b) gives a consumer the right, except to the extent contemplated in subsection (6), to receive goods that—(a) are reasonably suitable for the purposes for which they are generally intended.”

Section 56: Implied warranty of quality

32. Section 56 (2) gives the consumer the right to return the goods to the supplier within six months after delivery if the supplier does not meet the requirements and standards contemplated in section 55. In that event, the supplier must, at the consumer's discretion, without imposing a penalty and at the supplier's risk and expense, either (a) repair or replace the failed, unsafe, or defective goods, or (b) refund the price the consumer paid for the goods.

The non-aligned boot lid of the replacement vehicle.

33. Parliament introduced the CPA into the South African consumer landscape to promote consumers' social and economic welfare. It is against this framework that the Tribunal conducts its analysis of the facts of this matter with reference to the relevant sections of the CPA. In realising consumer rights, the Tribunal (or a court) must develop the common law and promote the spirit and purpose of the CPA. More importantly, the Tribunal must also make appropriate orders to give effect to a consumer's right of access to redress.
34. In our analysis of this matter, the Tribunal takes cognisance of the recent Supreme Court of Appeal (“the SCA”) matter, *Motus Corporation (Pty) Ltd and Another v Wentzel*.⁵ This case provided guidance when considering what may constitute a defect entitling a consumer to a purchase price refund within the meaning of section 53. The Tribunal deals with this aspect below.

⁵ *Motus Corporation (Pty) Ltd t/a Zambezi Multi Franchise and Another v Wentzel* [2021] All SA 98 (SCA).

35. The essential basis of the applicant's case is that the respondent sold him a new vehicle (the replacement vehicle); that he financed the full purchase price of the new vehicle; that the new vehicle is defective because the boot lid of the vehicle is not properly aligned; and because the new vehicle was fitted with a "used" radio. The "used" radio was later fitted by the respondent with a new radio and this matter is moot.
36. Turning to the non-aligned boot lid of the replacement vehicle, the applicant's main submission is that a new vehicle should not have a defect such as a non-aligned boot lid; that he is entitled to receive the new vehicle for which he paid the full purchase price with an aligned boot lid; and because this was not the case, he is entitled to pay a reduced purchase price for the vehicle. The applicant relies on sections 53; 54(2)(b); 55(2)(b) and 56(2) as a basis for alleging a contravention of the CPA by the respondent and thus seeks a finding of prohibited conduct against the respondent.
37. The respondent disputed that it acted in contravention of the CPA. The respondent referred the Tribunal to the MIOSA report ⁶ and to the NCC report⁷. Furthermore:
- 37.1 the respondent disputes that the defect complained of by the applicant is within the ambit of a defect as defined in section 53;
- 37.2 the respondent submitted that the replacement vehicle's non-aligned boot lid is within factory specifications of the Hyundai Creta as received from the manufacturer and thus not a defect as defined in section 53; and
- 37.3 the applicant is not entitled to the relief sought because the applicant has not satisfied the requirements of section 20 in that:
- (i) the applicant has not led any evidence that the non-aligned boot lid of the replacement vehicle, which is but one component of the vehicle, rendered the whole vehicle less useful, practicable, or safe for the purpose for which it was purchased, to justify a refund or any form of relief to the applicant as outlined in the CPA; and
- (ii) the applicant submitted that as of the date of the hearing the vehicle completed 117000 kilometres with the vehicle which demonstrates that the vehicle, despite the non-aligned boot lid, is indeed fit for purpose.

⁶ Pg 23-24 of the bundle.

⁷ Pg 228-243 of the bundle.

38. The respondent placed on record at the hearing and in its answering affidavit, that it only replaced the initial vehicle purchased by the applicant, being a silver Hyundai Creta with the replacement vehicle, a white Hyundai Creta 1.6 Executive M/T as a gesture of goodwill and without any admission of liability.
39. In this matter, the applicant must prove his case against the respondent on a balance of probabilities. Section 117 prescribes the standard of proof on matters before the Tribunal. It stipulates that *“in any proceedings before the Tribunal, or before a consumer court in terms of this Act, the standard of proof is on a balance of probabilities”*.
40. The Tribunal considered the allegations of the applicant and the evidence the applicant placed before the Tribunal in support of his allegations. The evidence consists, amongst others, of the founding affidavit of the applicant⁸, supported by the investigation report of the NCC investigator⁹; and the recommendations of the MIOSA¹⁰. The applicant also placed before the Tribunal the report of the Durban Central Panel Beaters¹¹, an approved Hyundai panel beater, who inspected the vehicle on 11 April 2019 and compared the applicant’s vehicle with another new 2018 Hyundai Creta. That report stated that the *“vehicle gaps and panel alignment was exactly the same...”*¹².
41. It is common cause that the applicant noticed and reported to the respondent that the boot lid of the replacement vehicle was not aligned on the same day that he took delivery of the vehicle; and that the respondent undertook to escalate the matter. This is confirmed in the applicant’s founding affidavit wherein he states that the non-alignment of the boot lid was not as noticeable on the replacement vehicle because it was white in colour. Other than pointing out that the boot lid of the vehicle was not aligned a few days after taking delivery of the vehicle, the applicant used the vehicle and only pursued the complaint when he brought it to the respondent for its first service at 15 000 kilometres; and had an argument with the employees of the respondent.
42. The Tribunal considered whether the non-aligned boot lid in a new vehicle could be considered a

⁸ Pg 10-18 of the bundle.

⁹ Pg 228-243 of the bundle.

¹⁰ Pg 23-24 of the bundle.

¹¹ Pg 27 of the bundle.

¹² Pg 23 of the bundle – MIO letter dated 3 April 2019.

43. defect within the meaning of section 53 read with sections 55 and 56. The question of what constitutes a defect as defined in section 53 was dealt with by the SCA in the matter of *Motus Corporation (Pty) Ltd and Another v Wentzel* where the SCA found that not every small fault is a defect as defined. The defect must either render the goods less acceptable than people generally would be reasonably entitled to expect from goods of that type. Or it must render the goods less useful, practicable, or safe for the purpose for which the consumer purchased them. Ultimately, the court found that a consumer is not entitled to a refund of the purchase price unless they satisfy the court that all requirements stipulated in section 56(3) have been met.
44. The Tribunal also went on further to consider the more difficult question of whether the non-aligned boot lid of the replacement vehicle:
- 44.1 renders the vehicle less acceptable than persons generally would be reasonably entitled to expect in the circumstances (section 53(1)(a)(i));
 - 44.2 impinges on the consumer's right to receive goods that are of good quality, in good working order; and free of defects (section 55(2)(b));
 - 44.3 entitles the applicant to a refund of a portion of the purchase price paid for the goods supplied (section 54(2)(b)); and
 - 44.4 entitles the applicant to a finding of prohibited conduct against the respondent to bring the relief sought by the applicant within the ambit of section 115(2)(b).
45. At this point it is important to note that the applicant, who is *dominus litus* in the matter, has not led any evidence of what an upmarket Hyundai Creta purchaser is *reasonably* entitled to expect of a new vehicle. The applicant has not disputed the assertion by the respondent that the non-aligned boot lid is built per the specifications of the manufacturer (who is not before the Tribunal as a party or a witness), and the applicant has not complained that the non-aligned boot lid is not in good working order. The applicant has also not laid a legal basis for his subjective view that the aesthetics of a non-aligned boot lid falls within the ambit of a defect as defined in section 53. The applicant has also not disputed that he used the vehicle since taking delivery of the vehicle to the tune of 117000 kilometres. Consequently, the evidence that the vehicle is fit for purpose remains uncontested.
46. Turning to the basis of the applicant's complaint, the applicant's argument is built upon the

premise that a non-aligned boot lid is a defect in the case of a new vehicle. This argument is quite plausible from the applicant's subjective perspective and point of view of perfection. But this is not the test. Instead, the test is an objective one as to what a reasonable person can expect when purchasing a new vehicle. This very important evidence was not led by the applicant to place the Tribunal in the position to act in terms of section 4(2)(b)(ii) and to make an appropriate or innovative order, to give practical effect to the consumer's right of access to redress.

47. The respondent referred the Tribunal to section 20, but this is not the applicant's case. The Tribunal thus had no reason to decide whether section 20 finds application in this matter.

FINDING

46. In the light of the above, the Tribunal finds that the applicant has not proved on a balance of probabilities that the non-aligned boot lid is a defect within the ambit of section 53(1)(a)(i); that the respondent contravened 55(2)(b) and section 56(2); and that the applicant is entitled to relief in terms of section 54(2)(b) of the CPA.

CONCLUSION

48. Consequently, the Tribunal concludes that the applicant has not made out a case that he is entitled to the order sought for the relief he seeks from the respondent in this application.

ORDER

49. Accordingly, the Tribunal makes the following order:

- 48.1. The application is dismissed; and
48.2. There is no costs order.

DATED AT CENTURION ON 29 OCTOBER 2022

[Signed]

**PA BECK
PRESIDING TRIBUNAL MEMBER**

Ms. D Terblanche (Tribunal Member) and Mr F Sibanda (Tribunal Member), concur.

Authorised for issue by The National Consumer Tribunal

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