



**CASE NO.: I 1786/2006**

**NOT IMPORTANT**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**HUGO LEON DE KOE**

**PLAINTIFF**

vs

**M & Z MOTORS**

**DEFENDANT**

CORAM: MILLER, AJ

Heard on: 15 July 2011

Delivered on: 23 September 2011

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**JUDGMENT:**

**MILLER, AJ:** [1] On 27 June 2005 the Plaintiff, Mr. Hugo Leon de Koe, travelled from Bethanie to Windhoek. The vehicle in which he travelled was a Mitsubishi Colt 2.8 bakkie. It was fitted with a turbocharged diesel engine. The engine was not the original engine fitted to the vehicle. The original engine had

been removed and a reconditioned engine was supplied and fitted to the vehicle by the defendant at its branch in Walvis Bay on 16 September 2004.

[2] The defendant issued a warranty against a possible breakdown of the engine which was to endure for a period of 2 years or a mileage of 20, 000 kilometres whichever occurred first.

[3] It was common cause before me that on 27 June 2005 the warranty was valid thus still binding the defendant to its terms.

[4] Whilst en route and at some point between Rehoboth and Windhoek, the engine overheated causing the plaintiff to stop. Thereafter the engine would not start.

[5] It is common cause that in the process the engine was substantially damaged and had to be replaced at a cost to the Plaintiff in the sum of N\$43, 755.20.

[6] The only issue that remained for me to determine was whether the overheating of the engine and the resultant damage was caused by some internal failure of the engine itself or whether it was caused because of a defective radiator cap. I mention at this juncture that it was conceded by Mr. Diedericks, who appeared for the plaintiff that if the damage was caused by the defective radiator cap, the plaintiff's case must fail. Mr. Mouton who appeared for the defendant likewise conceded that if the damage was caused by some

failure or defect in the engine itself, the defendant will be liable to compensate the plaintiff.

[7] The plaintiff and the defendant each called an expert witness in support of their contentions as to what caused the damage. The conclusions reached by them differ vastly except for one aspect, that being that the outer seal of the radiator cap was found to be defective when the vehicle was examined following the damage to the engine.

[8] The expert witness called by the plaintiff is Mr. Floris Johannes Louw. Mr. Louw, who admittedly is well-qualified, inspected the damaged engine of the plaintiff's vehicle during July 2005. He confirms that the outer seal of the radiator was defective when he examined the vehicle. His testimony is to the effect that the defective outer seal, did not cause or contribute to the fact that the engine became overheated and damaged. According to Mr. Louw the radiator cap contains both an inner and an outer seal. The purpose of the inner seal is to ensure that the cooling system of the engine including the radiator becomes pressurized when the engine is running. As the temperature of the water rises when the engine is running the water will expand and a certain amount of water will be pushed through the outer seal to the reservoir. Once the engine is no longer running, the volume of the water will shrink as the engine cools down and the water in the reservoir is sucked back to the cooling system through the outer seal.

[9] In the instant case the defect in the outer seal prevented the water from being sucked back into the engine. Instead air would be sucked into the cooling system through the outer seal. He testified that the amount of water pushed to the reservoir will leave the cooling system with sufficient water to allow the engine to run at normal operating temperatures.

[10] He also found clear signs that the engine had become overheated. The cylinder head had cracked and holes had been burned into the water jackets of the engine. He also found that the radiator itself had cracked due to abnormally high pressure in the cooling system. In addition there were clear signs on the inside of the bonnet that some water in the cooling system had been sprayed onto the under surface of the bonnet. When the engine was opened he states, the bottom end of the engine and the cylinders were full of water.

[11] Based upon his observations Mr. Louw concluded that some defect in the engine itself caused the cooling system to become over pressurized was the result that the radiator cracked thus allowing the water in the cooling system to escape. In turn this caused the engine to become overheated. Mr. Louw stated that cracks in the cylinder head or faulty stress bolts were the most likely culprits.

[12] The defendant called Mr. Thomas Jan Lambert, also a qualified auto technician to give expert testimony on its behalf. At the relevant time he was employed by the defendant, although he no longer is. He also examined the

vehicle and likewise found the outer seal of the radiator cap to be defective. He thereupon concluded that the defective radiator cap was the sole cause of the damage. He never stripped or examined the engine as such to look for other probable causes. His testimony is to the effect that the defective outer seal would cause all the water to be pushed out of the radiator if the engine overheats.

[13] The onus remains on the plaintiff to prove upon a balance of probabilities, in order to succeed, that the damage to the engine was caused by some failure or defect in the engine itself. In deciding whether or not the plaintiff has discharged the onus resting upon him I must have regard to the evidence of Mr. Louw and Mr. Lambert, the merits and demerits of their testimony, and the probabilities of the case itself.

[14] Having adopted that approach I prefer to evidence of Mr. Louw to the evidence of Mr. Lambert. Mr. Louw is clearly an independent witness. His examination of the engine to establish the cause of the damage was extensive and comprehensive. His factual findings when he examined the engine logically support the conclusions he came to. His testimony is supported by the fact that upon examination of the engine the bottom of the engine and the cylinder heads were full of water despite the fact that some water have been lost through the crack in the radiator. This fact is by no means decisive in itself but tends to support the conclusions reached by Mr. Louw.

[15] On the other hand the inspection by Mr. Lambert was cursory and went no further than ascertaining that the radiator cap was defective. That was sufficient to persuade him that the defective radiator cap was the cause of the damage. That had the effect that he was basically left to theorize and speculate on the possible effects that defect would have had. The fact as I indicated, that the bottom of the engine and the cylinders were full of water, detracts from his reasoning that the defective radiator cap had caused all the water to escape from the radiator. Had he properly inspected the engine, this discovery may have had the effect that he would have come to a different conclusion.

[16] I find that the engine became overheated due to a failure or defect in the engine itself.

[17] In the result I grant judgment in favour of the plaintiff in terms of Prayers 1, 2 and 3 of the Particulars of Claim.

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MILLER AJ

ON BEHALF OF THE PLAINTIFF

Instructed by:

Mr. Diedericks

Diedericks Incorporated

ON BEHALF OF DEFENDANT

Instructed by:

Mr. Mouton

Engling, Stritter & Partners