

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: I 3667/2015

In the matter between:

GIEL-HENTI BOSHOFF

PLAINTIFF

and

**ANDREW KOTZE TRADING CC (2005/1905)
TRADING AS POLKA DOT TRANSPORT AND
TOWING/POLKA DOT AUTO BODY**

DEFENDANT

Neutral citation: *Boshoff v Kotze Trading CC t/a Polka Dot Transport and Towing/Polka Dot Auto Body* (I 3667/2015) [2017] NAHCMD 30 (07 February 2017)

Coram: UNENGU AJ

Heard: 17 November 2016

Delivered: 07 February 2017

Flynote: Agreement – breach thereof – damages – causation between the damages incurred to the engine cooler and the defendant's action – test – what is the most reasonable explanation for the damages incurred amongst all the

possibilities adduced – plaintiff could not prove his claim on a balance of probabilities – claim is dismissed with costs.

Summary: The plaintiff issued summons against the defendant for damages in the amount of N\$ 67,932-50 suffered as a result of damage to the engine of his vehicle which ceased, due to overheating. The plaintiff claimed damages from the defendant due to a hole which he alleges was caused by the defendant's action when he fixed the motor vehicle. The defendant denied that the hole in the radiator was caused by him when he was fixing the plaintiff's car. The court dismissed the plaintiff's claim as it was more likely that the hole in the radiator was caused by some sharp object like a stone when the plaintiff drove the vehicle from Midgard to South Africa without a bumper and a belly plate protecting the radiator.

ORDER

(i) The claim is dismissed with costs.

JUDGMENT

UNENGU AJ:

Introduction

[1] The plaintiff, Mr Giel-Henti Boshoff has issued summons against the defendant Andrew Kotze Trading CC (2005/1905) trading as Polka Dot Transport and Towing Polka Dot Auto Body for damages in the amount of N\$ 67,932-50 suffered as a result of damage to the engine of his vehicle which ceased due to overheating.

[2] The amount of N\$ 67,932-50 is a combination of small different claims with interest on the rate of 20% per annum calculated from date of judgment to date of final payment, with cost.

Background facts

[3] It is common cause between the parties that the plaintiff took his vehicle to the defendant for repairs of damages sustained to the front part thereof in an accident, that the vehicle be repaired and restored to its pre-collision condition and further that all repairs to be done by the defendant in a proper workmanlike and professional manner.

[4] It is also not in dispute that the defendant was to fix and replace the vehicle's front bumper with an ARB type bulbar as an additional cost to the repairs to be done to the vehicle.

[5] On his part, Mr Kotze acting on behalf of the defendant, issued quotations listing prices for parts and paint, he would require to repair the vehicle. At the bottom of each quotation provided to the plaintiff, there are terms and conditions printed in fine letters – which read as follows:

“This quotation is valid for 14 days and may change without prior notice. The quotation is for obvious damages and not for damages that was not seen or that was apparent later after stripping of the vehicle. The vehicle will only be released after full payment was received for all work done, storage fee will be charged after work was done but payment not done in full. Glass is removed and fitted at owner's risk. We are not responsible for loss done to fire, theft or other unforeseen circumstances. All prices are valid as in the whole quotation and not part of the work. It is the responsibility of the vehicle owner to see that the repair cost is not more than the market value of the vehicle. Due to the severe damage repairs may not be 100% correct. 60% DEPOSIT IF NOT DONE BY INSURANCE. Some parts are not original but replacement parts. Andrew Kotze”.¹
(emphasis provided)

¹ See par. 59, 60, 61 and 62 of record.

[6] The plaintiff accepted the quotations with the terms and conditions contained therein - not forgetting that labour was not quoted for in all four quotations issued by the defendant for the plaintiff. I shall revert to the quotations later.

[7] In his particulars of claim, the plaintiff also claimed that during the time his vehicle was in the care and possession of the defendant and while the defendant was attending to the repairs and the fixing of the vehicle to its pre-collision condition, the defendant acted negligently, unworkmanlike and in an unprofessional manner resulting in damages to the plaintiff's engine cooler.

[8] Further, that as a result of the damaged engine cooler caused by the defendant, the vehicle's engine overheated and got damaged. According to the plaintiff, he duly complied with the terms of the agreement when he paid a deposit of N\$ 25,090.00 into the bank account of the defendant on 20 May 2015, for the defendant to proceed with the repairs to the vehicle.

[9] He, however, alleged further that the defendant breached the terms of the agreement in one or more of the following: "The defendant's services were unworkmanlike, of a poor quality and done in an unprofessional manner, that the defendant damaged the plaintiff's engine cooler causing the vehicle to overheat and the engine to suffer damages, and that the defendant did not finish the repairs within the two weeks period alternatively within a reasonable period of time".

[10] As already indicated above, many of the allegations contained in the particulars of claim of the plaintiff are either not in dispute or are common cause between the plaintiff and defendant. However, in his plea to the plaintiff's claim, the defendant denied that it was agreed upon between them that the vehicle will be repaired within two weeks from date of delivery of the vehicle, alternatively within a reasonable time. He denied that the defendant, during the time the plaintiff's vehicle was in the defendant's care and possession when attending to the repairs thereof to its pre-collision condition, acted negligently, unworkmanlike and in an unprofessional manner resulting in damages to the plaintiff's vehicle engine cooler. The defendant pleaded ignorance of the circumstances of the overheating of the engine and

claimed that the plaintiff drove the vehicle without a bumper and grill exposing the radiator to possible damage.

[11] In the joint proposed pre-trial order, the plaintiff and the defendant listed several issues of fact and law to be resolved during the trial. Under issues of fact, nine issues were listed. Among those nine issues listed, there are allegations more crucial to the resolution of the dispute. These are; firstly whether the parties agreed to a fixed period of time, which are two (2) weeks within which the defendant should fix and repair the plaintiff's vehicle alternatively within a reasonable period of time, whether the defendant damaged the plaintiff's engine cooler and whether the damages suffered and claimed by the plaintiff are as a result of the defendant's action.

[12] The second and next issue to be resolved during the trial per the joint pre-trial order is the issue of the time period within which to fix and repair the vehicle. This issue has already been discussed in the preceding paragraph. The same applies to the issue mentioned in paragraph 4.3 of the draft order with regard whether the plaintiff and defendant agreed that the defendant will charge no labour on the condition that he will attend to the repairs as and when he has time between other work.

[13] Other issues of fact to be considered by the Court per the pre-trial order are those contained in paragraphs 4.5 and 4.6 namely whether the defendant damaged the plaintiff's engine water cooler and whether the damages suffered and claimed by the plaintiff are a result of the defendant actions.

[14] The above mentioned factual issues are in my view, the head gear of the puzzle of this matter. To unpuzzle the dispute, evidence adduced during the trial must be considered first.

[15] During the trial which took place on 2 November 2016, Mr Small represented the plaintiff while Mr Van Vuuren, acted on behalf of the defendant.

[16] Three witness testified for the plaintiff. They were the plaintiff himself, his mother (Mrs Boshoff) and Mr Padrix Kruger as an expert witness. On the other hand, Mr Kotze and Mr Olivier testified on behalf of the defendant.

Evidence for the plaintiff

[17] In brief the plaintiff testified that he took his Toyota Fortuner to the defendant on 29 May 2015 for repairs of damages to the front of it sustained in an accident, that the defendant provided him with four quotations for repairs of the damaged part of the vehicle and the fitment of an ARB bumper as an additional expense. He testified further that after two weeks, he enquired from the defendant how far he (defendant) got with the repairs of the vehicle. The defendant made various excuses why he did not finish with the repairs of the vehicle.

[18] He further testified that on 26 June 2015 he told the defendant (Mr Kotze) that he has to drive to South Africa to visit his father in-law who was sick, therefore wanted his vehicle urgently and also to fetch furniture for which he had to hire a 6 meter long and 2 meter high trailer. He said that Mr Kotze promised the vehicle to be ready by 29 June 2015. On 29 June 2015, the plaintiff went to the workshop of the defendant when he found the employees of the defendant busy fitting the engine cooler of his vehicle, despite the undertaking that 29 June 2015 the vehicle would be ready for delivery. He (plaintiff) also observed his engine cooler lying on the ground of the premises near the vehicle, even though an amount of N\$ 25 000.00 for the repair of the vehicle was already paid to the defendant on the 20 May 2015; he was also not satisfied with the paint work on the vehicle.

[19] He further testified that he then drove to Windhoek from Okahandja where he met Mr Olivier, the defendant's driver at Lyn-X, with his vehicle to fit the ARB bumper on it. According to him, his vehicle was driven from Okahandja to Windhoek by Mr Olivier without a front bumper and a belly plate. He inspected the vehicle and saw the engine bay sprayed with anti-freeze. He asked Mr Olivier where the anti-freeze came from, and was told that the anti-freeze came from the radiator at the time the

cooling system of the vehicle was fitted and filled with water and anti-freeze in Okahandja. He did not see any leakage from the cooling system.

[20] The plaintiff further testified that on the premises of Lyn-X, he loaded a few items on the vehicle and while driving to Okahandja he noticed that the engine of the vehicle was running hotter than normal and as a result, they stopped at a service station in the Lafrenz Industrial area, still in Windhoek, where they filled the cooling system of the vehicle with two buckets (approximately 10 litres) of water. Thereafter they drove to Okahandja where he dropped off Mr Olivier and proceeded alone to Midgard Lodge with the engine of the vehicle operating at normal temperature until Midgard.

[21] The following day (30 June 2015), early in the morning between 03h00 and 04h00, the plaintiff, before departing for the Republic of South Africa checked the water levels of the vehicle's cooling system and found it full and in order.

[22] Approximately 17 kilometres from Midgard on his way to South Africa and while towing a heavy trailer, as described earlier in the judgment, he found out later that the engine overheated, ceased and as a result he paid N\$ 49 034.30 to repair the engine.

[23] The plaintiff was extensively cross-examined by Mr Van Vuuren, counsel for the defendant. The cross-examination covered the particulars of claim and beyond. It also came out clearly during the cross-examination of the plaintiff that the dispute to be resolved in the matter is the question of when, where and how the cooler or radiator was punctured, causing the engine of the vehicle to overheat and cease.

[24] Mrs Amelia Boshoff, the mother of the plaintiff also testified on behalf of the plaintiff. However, her testimony is of no assistance to the resolution of the claim. In any event, as a mother of the plaintiff, Mrs Boshoff is not a neutral and objective witness, therefore she was not impartial in her testimony.

[25] The third and last witness to testify for the plaintiff is Mr Padrix Kruger, an expert in rebuilding, servicing and repairing engines for trucks and cars, mainly diesel

engines. His business is known as Car Master Engineering CC in Otjiwarongo, of which he is the sole member of the close cooperation which he has established in 1997. Mr Kruger testified that the business of Car Master Engineering consists of general engineering workshop in terms of which, Car Master Engineering, specializes in the rebuilding of engines for both cars and trucks. According to him, their main speciality is diesel engines, because he is a qualified diesel mechanic. Before he started this business, he worked eight years at Otto Engineering, where he also did diesel mechanical work on engines.

[26] Mr Kruger further testified, amongst others, that the plaintiff during August 2015 brought his Toyota Fortuner 3 litre diesel 2010, to his workshop to look at the engine and provided him (plaintiff) with a quotation to fix and repair the engine. After the plaintiff explained to him what happened to the engine, he removed the engine from the car and disassembled it. The witness further testified that after taking the engine apart, he came to the conclusion that the engine needed to be overhauled, rebuilt and that the reason for the overheating was a very small hole located in the engine cooler.

[27] Furthermore, Mr Kruger testified that according to his observation, the engine cooler was damaged while it was removed from the body of the vehicle and placed outside the vehicle, but could not have sustained the damage (hole) by a stone or the like while being driven. The reason for his assumption is because the hole in the radiator was at the back of the radiator covered with a plastic (cowling) attached to the body of the vehicle and the radiator which covers the spot where the hole was.

[28] Mr Kruger, however, in his evidence in-chief did not express an opinion how the hole in the radiator happened while being removed from the vehicle and placed on the ground, if the radiator had a plastic cover around it for protection against rough handling thereof, in particular when being removed from the vehicle or placed back as a unit, because the cover is attached to the radiator. When asked what could be the cause of the hole in the radiator, Mr Kruger was not sure except for saying that it must have been a sharp object, but not a blunt thing.

[29] In cross-examination, Mr Kruger was again doubtful with regard to how the cooler was punctured. It was difficult for him to say what caused the hole in the cooler and conceded that it is possible for an object to hit the cooler from behind, if it passes through a turning fan. Mr Kruger conceded again that a sharp stone could also have caused the hole, while the vehicle was being driven on gravel road without a bumper and a belly plate, which are there to protect the radiator (cooler) amongst others.

[30] Similarly, when asked to explain from where the dry anti-freeze mixed water on the cowling came from, Mr Kruger was unable to tell the Court from where, as the hole in the cooler was underneath the cooler. His opinion is that the anti-freeze was splashed to the top by the fan as a result of pressure – which is in contrast with what he testified, that the water in the cooler would flow over from top down to the cover when it gets pressure.

[31] In addition, Mr Kruger conceded that he specialized as a diesel mechanic for which he obtained diplomas but not in radiator (cooler) repairs even though he has a radiator shop cleaning radiators, other than aluminium radiators (cooler), like the one fitted in the Toyota Fortuner in question.

[32] On further questions put to him by Mr Van Vuuren, with regard to the functions of a bumper of the vehicle – Mr Kruger answered that the bumper is there to protect the radiator from being damaged by objects and stuffs and for the vehicle to look good, while the belly plate is there also to protect the radiator and the V-belt (fan belt). He also said that no pressure test was done on the radiator.

Evidence for the defendant.

[33] Mr Van Vuuren for the defendant, called two witnesses to testify on behalf of the defendant, namely Messrs John James Kotze and Frans Gysbert Olivier, the owner and employee of the defendant respectively.

[34] Mr Kotze testified that the plaintiff brought his Toyota Fortuner motor vehicle with registration number JJF 166 NW to his workshop on or about 29 April 2015 and requested him to give him a quotation for repairs to the body of the motor vehicle.

[35] He further testified that he furnished the plaintiff with two quotations with the same number 482015, but for different amounts. He said that the first quotation was in the amount of N\$ 23 577.30, for the repairs to the body of the vehicle only; while the other quotation was for an amount of N\$ 34 650.65, as the quotation included the cost for the fitting of an ARB type bull bar. Both quotations were valid for 14 days.

[36] It is further Mr Kotze's evidence that it was agreed between him and the plaintiff that he will not charge the plaintiff for labour, because Mr Kotze will attend to the repairs of the vehicle as when he had time to do so between other work.

[37] This part of the evidence, however, was vehemently denied by the plaintiff. Instead, the plaintiff alleged that the agreement between them was that Mr Kotze will attend to and repair the motor vehicle within two weeks from date of delivery. Mr Kotze in turn, denied that he agreed to repair the vehicle within two weeks. According to him, he did not charge labour, because he has to repair the motor vehicle when he had time between his other work.

[38] The issue of time within which Mr Kotze was supposed to repair the motor vehicle provoked intensive cross-examination and spilled over to arguments and submissions by both counsels. This issue, however, is not important to the resolution of the claim, as Mr Kotze denied that he or his employees acted negligently during the time when plaintiff's motor vehicle was being repaired at his workshop or during the same time.

[39] Mr Frans Gysbert Olivier, a driver in the employ of the defendant at the time, testified that at the end of June 2015, he took the plaintiff's motor vehicle from Okahandja to Lyn-X in Windhoek to fit it with ARB bumper. He further testified that he did not experience any problems, for example the motor vehicle overheating from Okahandja to Lyn-X in Windhoek, except for the battery which was flat for which, he kept the motor vehicle idling for approximately half an hour. However, on their way

back to Okahandja while still in Windhoek, the plaintiff mentioned to him that the engine temperature was a bit higher and stopped at a service station in the Northern Industrial Area and filled up the radiator with water, he said. There after they drove back to Okahandja and the motor vehicle did not experience any overheating. After Mr Olivier was cross-examined by Mr Small, the defendant closed its case.

Submissions

[40] The plaintiff filed written heads of argument and also made oral submissions. In his written heads, which he expanded on during oral submissions, Mr Small invited the Court to consider issues the parties listed in the pre-trial order. Those are issues pertaining to the terms of the partly written and partly oral agreement, whether the parties agreed to a fixed period of time, namely two weeks for the defendant to repair and fix the plaintiff's motor vehicle or within a reasonable period of time; whether they agreed that defendant will charge no labour, on the condition that he will attend to the repairs as and when he had time between other work; or whether the defendant orally or in writing undertook to finish with the repair of the plaintiff's motor vehicle; whether the defendant damaged the engine cooler of the plaintiff, whether the damages suffered and claimed by the plaintiff are as a result of the defendant's actions, whether the defendant breached the agreement entered between them and whether the breach caused by the defendant resulted in the plaintiff suffering damages.

[41] To support his stance of reasoning, Mr Small referred the Court to various cases² dealing with the requirements of a contract and what the plaintiff must prove in a claim of damages, as authority. Further, Mr Small, through case law³, pointed out to the Court what type of evidence the plaintiff presented in the matter and as such invited the Court to accept that the plaintiff has discharged his burden of proof.

[42] Mr Van Vuuren, for the defendant in his heads of argument also referred to issues in the pre-trial order – which issues are already summarized above in the judgment. After summarizing the evidence of all the witnesses who testified in the

² Plaintiff's Heads of argument p 3.

³ *Govan v skidmore* 1952(1) SA 732(N) at 734; *A A Onderlinge Assuransie Bpk v De Beer* 1982(2) 603(A).

matter, Mr Van Vuuren submitted and argued that the dispute of fact between the parties is where, how and when did the cooler of the plaintiff's vehicle sustained the hole, which led to the damages, which according to him is the cause of the damages.

[43] Counsel also discussed the evidence with reference to the legal principles of the law of contract⁴ and came to the conclusion that the plaintiff failed to prove a causal link on a balance of probabilities as required and thus requested the Court to dismiss the plaintiff's claim with costs.

Discussion and Conclusion

[44] It is common cause between the parties that their versions are at loggerhead with regard to the cause of the hole in the cooler (radiator), as to how, when and where it happened. It is further common cause that the burden of proof is on the plaintiff to prove his claim against the defendant on a balance of probabilities. The plaintiff will discharge such burden of proof by presenting direct, credible evidence or by means of circumstantial evidence.

[45] In this matter, there is no direct evidence presented by the plaintiff concerning the cause of the hole in the cooler, where it happened, how it happened and by whom the hole was so caused. However, what is clear from the evidence presented is that the engine of the plaintiff's motor vehicle ceased as a result of a leakage of the fluid from the cooler through the hole.

[46] In that regard, the plaintiff through his counsel, Mr Small has implored the Court to draw inference from the evidence that the cooler of the plaintiff's motor vehicle occurred on the premises or workshop of the defendant, the time the vehicle was in the care of the defendant. That contention is based on the evidence of the plaintiff when he testified that he saw his cooler lying on the ground next to his vehicle on the premises of the defendant while the defendant's employees were busy working on his vehicle. This evidence has been denied by the defendant.

⁴ Defendant's Heads of argument p 11.

[47] I also cannot accept the evidence of the plaintiff that the cooler got a hole in it while lying on the ground on the premises, nor shall I draw any inference to that effect, because that is in my opinion not the only reasonable and most probable inference to be drawn from the facts of the present matter. (See Schmidt Bewysheg)⁵

[48] In *Govan v Skidmore*⁶, Selke, J refused to apply the principles laid down in *R v Blom* 1939 AD with regard to the inferences to be drawn from the circumstantial evidence and stated: “in general, in finding facts and making inferences in a civil case, the Court may go upon a mere preponderance of probabilities, even although its so doing does not exclude every reasonable doubt.”

[49] He continued: “by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several, even though that conclusion be not only reasonable one.”

[50] That being the case, and upon the preponderance of the facts of this matter, I am unable to conclude that the more natural or plausible conclusion is that the hole in the cooler was caused by the conduct of the defendant or its employees while working on the motor vehicle of the plaintiff. It is so, because there is evidence that the motor vehicle was driven from Okahandja, a distance of approximately 70 kilometres to Lyn-X in Windhoek and back to Midgard via Okahandja, a distance of approximately 135 kilometres without any serious problems, except for the temperature gauge going slightly above normal. Whereas it is more probable and plausible that the cooler could have been damaged when the plaintiff drove his motor vehicle the following day early in the morning from Midgard to South Africa without a bumper and a belly plate.

[51] I must also mention that Mr Kotze conceded that the paint work initially done to the body of the vehicle, was not done properly, which he corrected at a later stage. In any event, the paint work to the body of the vehicle has nothing to do with the hole in the cooler which is also not an allegation made by the plaintiff in his

⁵ 4th ed at 91-93

⁶ 1952 (1) SA 734

particulars of claim. I also refuse to accept that Mr Kotze and plaintiff agreed to repair the vehicle within two weeks alternatively within a reasonable time. It is possible that Mr Kotze did not charge labour because he had to repair the motor vehicle when he had time to do so.

[52] In conclusion, I am not satisfied with the evidence of Mr Kruger, the expert called by the plaintiff as a whole, in particular when he said that the plaintiff's cooler had a hole already when Mr Olivier drove it from Okahandja to Lyn-X in Windhoek and when it was driven from Windhoek to Midgard via Okahandja by the plaintiff himself. He said that the hole in the radiator (cooler) could have been blocked temporarily by an object like a scale. This is totally speculation and I refuse to accept his opinion. I agree with Mr Van Vuuren that no evidence was led by the plaintiff about the possible presence of scales in the radiator (cooler). It is a mere speculation than an expert opinion which could assist the Court in making a proper finding on the claim. In fact, Mr Kruger testified that he did not inspect the cooler for possible scales.

[53] Similarly, I agree again with Mr Van Vuuren that Mr Kruger is not an expert in respect of radiators and should not be regarded as such, because he failed to tell the Court about his knowledge with regard radiators of Toyota Fortuners. Accordingly, with the evidence presented together with the submissions made by both counsel, I came to the conclusion that it is possible that the radiator got a hole when the plaintiff himself drove the motor vehicle on the gravel road from Midgard to the main road on his way to South Africa.

[54] The plaintiff, not only took a high risk to drive his vehicle on that road in the early morning without a bumper in front and belly plate under to protect, amongst others, the radiator of his vehicle, but also gambled with the safety and security of the engine, radiator and its expansion tank by exposing them to rocks, sharp and blunt stones, to mention a few. In the result, I conclude that the plaintiff failed to prove his claim against the defendant and I make the following order:

- (i) The claim is dismissed with costs.

E P UNENGU
Acting Judge

APPEARANCES

PLAINTIFF:

AJB Small
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DEFENDANT:

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