

REPUBLIC OF NAMIBIA

NOT REPORTABLE



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

Case No: HC-MD-CIV-ACT-CON-2016/02182

In the matter between:

NAMI PREFABRICATED HOUSING CLOSE CORPORATION **PLAINTIFF**

and

**PUPKEWITZ MOTORS (PTY) LTD T/A PUPKEWITZ
HINO TRUCKS** **DEFENDANT**

Neutral citation: *Nami Prefabricated Housing CC v Pupkewitz Motor (Pty) Ltd* (HC-MD-CIV-ACT-CON-2016/02182) [2019] NAHCMD 230 (5 July 2019)

Coram: USIKU, J

Heard on: 6-7 August 2018, 9-10 August 2018, 4 February 2019 and 7 March 2019

Delivered: 5 July 2019

Reasons released: 9 July 2019

Flynote: Contract – Warranty given by defendant to plaintiff in respect of service on plaintiff's engine – Engine breaks down within period of subsistence of the warranty –

Evidence showing that engine broke down due to sand and silicon introduced into the engine – Court holding that defendant is not liable to repair the engine or to replace it with a new engine.

Summary: The plaintiff and defendant entered into an oral agreement in terms of which the defendant agreed to repair an engine of the plaintiff's vehicle. The defendant furnished the plaintiff with a written warranty in respect of the repairs. The engine broke down within the period of subsistence of the warranty. Evidence given shows that the engine broke down due to sand and silicon introduced into the engine subsequent to the repairs. Court held that the defendant is not liable to repair or replace the engine under the warranty.

ORDER

1. The plaintiff's claim is dismissed with costs.
2. The defendant's counterclaim succeeds and judgment is granted in favour of the defendant against the plaintiff in the following terms:
 - (a) payment in the amount of N\$ 15,158.32;
 - (b) interest on the aforesaid amount at the rate of 20% per annum a tempore morae to the date of final payment;
 - (c) costs of suit.
3. The matter is removed from the roll and regarded finalised.

JUDGMENT

USIKU, J:

Introduction

- [1] The plaintiff instituted an action in this court seeking the following relief:
- (a) an order confirming the cancellation of the agreement;

- (b) an order directing the defendant to return the vehicle to the plaintiff;
- (c) payment of the amount of N\$ 394,128.96 or the amount of N\$ 235,862.55;
- (d) interest on the aforesaid amount at the rate of 20% per annum, calculated from 06 March 2015 to the date of final payment;
- (e) costs of suit.

[2] The defendant launched a counterclaim, tendering the return of the plaintiff's vehicle against payment of the undermentioned amount, and seeking an order in the following terms:

- (a) payment in the amount of N\$ 15, 158.32;
- (b) interest at the rate of 20% per annum a tempore morae to date of payment;
- (c) costs of suit.

[3] The plaintiff and the defendant entered into an oral agreement on or about June 2014, in terms of which the defendant undertook to effect repairs to the engine of the plaintiff's vehicle (a certain Toyota Hino 500 truck). It is common cause that the defendant warranted that the repairs on the engine would be effected in a workmanlike manner and with the necessary skill and care. This warranty was reduced to writing and reflects that the warranty for engine repairs is for one year or 20 000 km (whichever comes first) from the date of the return of the vehicle to the plaintiff after the repairs, subject to a condition that the vehicle receives regular service at every 10 000 km intervals within the period of subsistence of the warranty.

[4] The vehicle was returned to the plaintiff after the repairs, on or about 8 December 2014. The plaintiff paid an amount of N\$ 235,862.55 in respect of the aforesaid repairs.

[5] On or about 9 February 2015 the plaintiff returned the vehicle to the defendant due to oil leakage from the engine. On or about 23 February 2015 the defendant

returned the vehicle to the plaintiff after the aforesaid leakage was repaired, without charge.

[6] On the 06 March 2015 the engine of the vehicle broke down and the plaintiff returned the vehicle to the defendant for repairs. The vehicle has been at the defendant's workshop since 06 March 2015 up to date.

[7] The defendant alleges that on inspection, it established that the engine was damaged beyond economical repair, due to sand and silicon having entered the engine. The defendant further argues that any repairs, under the circumstances, are not covered by the warranty and that the defendant is not liable to replace the current engine with a new engine. On or about 13 April 2016 the defendant furnished the plaintiff a quotation in the amount of N\$ 394,128.96 as the amount to be paid for the total repair of the vehicle.

[9] The plaintiff contends that the warranty still subsists as the period of one year since the repairs, has not lapsed and the vehicle did not exceed 10 000 km. Since the engine broke down during the period of the warranty, the plaintiff argues, the defendant must repair the engine in accordance with the warranty.

[10] The plaintiff, therefore, instituted the present action primarily claiming for payment of N\$ 394,128.96 or the amount of N\$ 235,862.55, together with interest, as aforesaid.

[11] The defendant denies liability, and claims that when the plaintiff's vehicle broke down on 6 March 2015, the defendant arranged the vehicle to be transported to the defendant's premises by Tow-In Specialists. The defendant installed a new starter (not covered under the warranty), disassembled the engine to determine the defect and that for the foregoing services, the plaintiff is indebted to the defendant in the amount of N\$ 15, 158.23, which the defendant now claims.

[12] The plaintiff denies any liability to the defendant and prays that the defendant's counterclaim be dismissed.

The version of the plaintiff

[13] The plaintiff called three witnesses, namely Gu Di ("Mr Di"), Christo Bouwer ("Mr Bouwer") and Nicolaas Albertus Smith ("Mr Smith").

[14] Mr Di testified that he is a member of the plaintiff and represented the plaintiff in the conclusion of the oral agreement in respect of the repairs by the defendant of the vehicle in question. Most of the issues testified to by Mr Di are common cause, therefore, I would not dwell much on his testimony.

[15] Mr Bouwer testified as an expert witness. He is trained as Diesel Electro-Technical Fitter and operates own business in the mechanical-electrical automotive industry.

[16] During July 2017 Mr Bouwer, in the company of Mr Smith, inspected the engine in question at Pupkewitz Trucks. He found the engine lying in the open, dismantled, without anything covering it.

[17] The engine was in an open workshop and was exposed to sand dust and other dirt which might have entered the engine. Mr Smith observed that the crankshaft showed clear signs of overheating due to poor lubrication. It was obvious that the crankshaft was damaged beyond repair and had to be replaced. He also observed that five of the piston cooler bolts were stuck in an open position and the sixth one was $\frac{3}{4}$ open. When the piston cooler bolts are open, the oil pressure will drop, due no operational function. He also found that the piston cooler bolts were not renewed, as no piston cooler bolts are reflected on the invoice of the engine repair. In his opinion it is a requirement in practice, that when an engine is overhauled the piston cooler bolts must be replaced with new ones.

[18] Mr Bouwer testified that there are about two ways in which sand or dust may enter the engine namely:

- (a) when someone pour sand/dust into the engine or
- (b) when the air pipes from the air filter box to the engine are defective or damaged.

[19] Mr Bouwer inspected the air-pipes and other components and did not find any damage.

[20] If the engine seizes due to sand or dust that has entered the engine, a grinding paste would form as a result of the mixture of sand, dust and oil and this grinding paste would be visible on the operational components of the engine. Mr Bouwer found no evidence that the engine was filled with sand or dust that would consequently have caused damage to the engine.

[21] In his opinion, the engine components were not properly cleaned before the engine was assembled and that those components were not properly fitted with the prescribed tensions and clearances. In his opinion, the piston cooler bolts were not replaced with new ones which resulted in poor oil pressure which led to lubrication failure and eventually to engine seizure.

[22] In cross-examination, when confronted with the version of Mr Stegemann (a witness for the defendant) who inspected the engine in question in 2015, two years before Mr Bouwer inspected the engine, and who found excessive amount of dirt, dust and sand, Mr Bouwer testified that he could not comment on that because Mr Bouwer was not there at that time.¹

[23] Mr Smith also gave this evidence as an expert. Mr Smith has experience in the investigation of cases involving motor vehicles, businesses and houses, in relation to

¹ Pages 85-86 of the transcribed record of proceedings.

investigations of losses in insurance claims. He has served as a police officer from 1979 to 1998 with a rank of Chief Inspector. He was appointed as a case investigator on the plaintiff's engine. In accordance with that mandate he jointly prepared a report with Mr Bouwer.

[24] During the last part of July 2017, he together with Mr Bouwer, inspected the engine at Pupkewitz Trucks, Northern Industrial Area. Upon inspecting the engine, he reached the conclusion that the engine seized due to oil failure. He observed a blue colouring on the crankshaft and on other operational parts. The blue colouring is mainly caused when an operational component overheat due to shortage of lubrication.

[25] Mr Smith did not find any sludge or debris in the engine. The engine parts were quite clean. If the engine seizes due to sand or dust that had entered it, a grinding paste would form as dust and sand mix with oil. That grinding paste would be visible. Mr Smith did not find evidence that sand or dust had entered the engine.

[26] The conclusion that Mr Smith reached is that, the components were "most probably" not properly cleaned before assembling the engine.² Furthermore, Mr Smith is of the view that such components were not properly fitted with the prescribed tensions and clearances. According to Mr Smith, these are the possibilities that he and Mr Bouwer discussed.³

[27] Furthermore Mr Smith testified that the piston cooler bolts were not replaced with new ones which resulted in poor oil pressure.

[28] During cross-examination, Mr Smith's attention was drawn, by counsel for the defendant, to page 11 of the defendant's discovery bundles, that what Mr Bouwer and Mr Smith referred to as "piston cooler bolts" is also referred to as "valve sub-assembly oil cooler bolts". And that those items are indicated at page 11 as "bolt cylinder 12, bolt conrod 12, then seal valves 24, sub-valves 6". And that sump oil cooler valves (piston

² Page 110 of the transcribed record of proceedings.

³ Ibid.

cooler bolts) were, according to that document, replaced with new ones. On this score Mr Smith indicated that he could not dispute that point as he is not conversant with “sub-assembly valves.”⁴

The version of the defendant

[29] The defendant called three witnesses namely: Walter Stegemann, (“Mr Stegemann”), Bonnie Pierre Charles Du Plooy (“Mr Du Plooy”) and Elize De Kock (“Ms De Kock”).

[30] Mr Stegemann gave evidence as an expert. He is qualified as a diesel mechanic. He testified that on or about 26 October 2015 he inspected the vehicle and the engine in question, at the plaintiff’s request. He inspected the engine at the premises of Dressel House Engineering, in Windhoek. He thereafter prepared his report on the same day.

[31] His findings were that there was sand, silicon (a form of processed sand that could only happen if sand was in the running engine), in the engine. According to him he found the engine uncleaned and dirty.⁵ He swirled his finger in the oily hollow internal components of the engine and observed particles which he identified as metal parts, sand parts and silicon.⁶

[32] Mr Stegemann could not determine how the sand found its way into the engine, as the engine was removed from the vehicle and disassembled. In his opinion, sand could have found its way into the engine either intentionally or by way of a broken air pipe or air filter. In his opinion the engine was damaged beyond economical repair. The cause of such damage to the engine, in his opinion, is the result of the sand and silicon introduced into the engine.

⁴ Page 114 of the transcribed record of proceedings.

⁵ Page 134 of the transcribed record.

⁶ Pages 135-136 of the transcribed record.

[33] According to Mr Stegemann, the representative of the plaintiff was not satisfied with his (Stegemann's) findings. Mr Stegemann invited the representative of the plaintiff, to a meeting to discuss the findings in the report, however such meeting never took place.

[34] On or about 21 July 2016, Mr Stegemann was approached by the defendant to assist the defendant compile a report on the engine in question. Mr Stegemann told the representative of the defendant that he had already compiled a report on the same engine. The defendant pointed out that they need a report for their records. Mr Stegemann indicated that he would give the defendant the same report but would only change the date and the name of the addressee. This, Mr Stegemann did on 21 July 2016.

[35] Mr Du Plooy also gave evidence as an expert. He has practical experience in the field of oil lubricants for engines. He testified that on or about 24 March 2015 he received an oil sample from the defendant. Mr Du Plooy forwarded the sample to the laboratory of WearCheck Africa (Pty) Limited, Pine Town in South Africa, for analysis. He received a report on the content of the sample on or about 7 April 2015. His interpretation of the analysis of the report from WearCheck Africa is that there is excessive amount of silicon contamination in the sample of oil.⁷ Silicon indicates existence of dust, in excessive amounts, in the oil sample in question.⁸

[36] Ms De Kock testified that she was an employee of the defendant at the material time. She occupied a position as senior service manager of the defendant. The engine in question was removed from the vehicle and sent to Dressel Haus Engineering for inspection and advice. Oil samples were collected by Mr Du Plooy of WearCheck Africa (Pty) Ltd. Mr Du Plooy prepared a report on the findings contained in the report from WearCheck Africa.

⁷ Pages 180, 178 and 181 of the transcribed record.

⁸ Page 180.

[37] In regard to the defendant's counterclaim, Ms De Kock testified that on 06 March 2015 the defendant instructed Tow-In Specialists to tow the plaintiff's vehicle from the Rehoboth road-block to Pupkewitz Trucks, after an engine failure. The vehicle was towed to the defendant's premises on the 06 March 2015. The Tow- In Specialists furnished the defendant with the invoice dated 06 March 2015. Ms De Kock also testified that the defendant provided the services set out in Annexure "A" to the defendant's counterclaim and that payment in regard to services set out in Annexure "A" is still outstanding.

Submissions

[38] In the oral closing submissions, counsel for the plaintiff submits that the plea raised by defendant is one of confession and avoidance. The defendant admits that the warranty remained extant by the time the vehicle was returned to the defendant on the 06 March 2015. The defendant pleads that upon inspections, it established that the damage to the engine was caused by sand and silicon in the engine and the engine was damaged beyond economical repair. Under such circumstances, the defendant claims that it is not liable to repair the engine or to replace the engine with a new one.

[39] Counsel for the plaintiff, therefore, submits that the onus is on the defendant to prove the facts alleged for the purposes of avoiding liability. The defendant must prove that sand and silicon caused damage to the engine and also prove that these were the terms of the agreement on the basis of which liability could be avoided.

[40] Counsel for the defendant agrees with the legal principles above as set out by counsel for the plaintiff.

Analysis

[41] The court is presently confronted with two versions. One version by the defendant that the damage to the engine was caused by sand and silicon. The other

version is that of the plaintiff that damage to the engine was caused by reasons of engine components not having been “properly” cleaned before the engine was assembled and that those components were not been “properly” fitted with the prescribed tensions and clearances. Evidence given by both parties on this aspect was expert evidence.

[42] The evidence given by Mr Stegemann is that on 26 October 2015, he inspected the engine in question and found the engine uncleaned and dirty and he saw sand and silicon in the oily hollow internal components of the engine. The evidence of Mr Stegemann, on this aspect is uncontested. He inspected the engine personally and testified to what he saw. In his opinion, sand and silicon should not be in the engine and that the cause of the damage to the engine is sand and silicon having been introduced into the engine.

[43] Mr Bouwer and Mr Smith did not lay the basis for their opinion that the engine components were not “properly” cleaned or were not “properly” fitted with the prescribed tensions and clearances. Mr Bouwer and Mr Smith were not present when the engine was assembled and did not give reasons that led them to such conclusions. The rule for the production of opinion evidence is that the witness must lay the basis for the opinion and must set out the methodology used and the processes undertaken in reaching such opinion.

[44] In my view, the probabilities on the uncontested evidence presented on behalf of the defendant favour the version of the defendant that sand and silicon had found their way into the engine and this led to the engine getting damaged as set out in the evidence. On the evidence given by witnesses on both sides, the engine was damaged beyond economical repair.

[45] Having considered the terms of the warranty in question and the totality of the evidence given, I am of the opinion that it was not the intention of the parties that the warranty is to include a situation where foreign substances are introduced, in whatever

way, into the engine, subsequent to the repairs. From the terms of the warranty, the warranty subsists in respect of the repairs effected on the engine. In my opinion, that does not include a situation where sand and silicon was introduced into the engine subsequent to the repairs in question.

[46] For the foregoing reasons, I am of the opinion that the defendant is not liable for the costs of repairing and/or replacing the engine.

[47] As far as the counterclaim of the defendant is concerned, the evidence by Ms De Kock about the counterclaim was not contested. In her evidence she testified that the defendant has rendered the services set out in Annexure "A" to the defendant's counterclaim, in favour of the plaintiff and that the amount set out in Annexure "A" remains outstanding. I am therefore satisfied that the defendant has proved its counterclaim on a preponderance of probabilities, and is entitled to the relief it claims.

Conclusions

[48] In conclusion, insofar as the main claim is concerned, I am satisfied that the defendant has proved on the balance of probabilities that sand and silicon was introduced into the internal mechanisms of the engine subsequent to the repairs. Such sand and silicon was the direct cause of the damage to the engine. On the totality of the evidence adduced and from the terms of the warranty, the defendant is not liable for the costs of repairing and/or replacing the engine. As regards the counterclaim, the defendant has proved its case on the balance of probabilities and is entitled to the relief it seeks.

[49] In the premises, I make the following order:

1. The plaintiff's claim is dismissed with costs.
2. The defendant's counterclaim succeeds and judgment is granted in favour of the defendant against the plaintiff in the following terms:

- (a) payment in the amount of N\$ 15,158.32;
 - (b) interest on the aforesaid amount at the rate of 20% per annum a tempore morae to the date of final payment;
 - (c) costs of suit.
3. The matter is removed from the roll and regarded finalised.

B Usiku
Judge

APPEARENCES

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