

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT- OTH-2019/00268

In the matter between:

MCDONALD TENDAI NYAMAYARO

PLAINTIFF

and

PZN PANELBEATERS CC

DEFENDANT

Neutral Citation: *Nyamayaro v PZN Panelbeaters CC* (HC-MD-CIV-ACT-OTH-2019/00268) [2020] NAHCMD 6 (21 January 2021)

CORAM: PRINSLOO J

Heard: 7-10 September 2020; 28 September 2020, 4 November 2020

Delivered: 21 January 2021

Flynote: Civil Practice – Application for absolution from the instance at the close of the plaintiff’s case – The test for absolution – Whether there is evidence on record upon which a court applying its mind reasonably could or might find for the plaintiff – Court finds plaintiff to have established a *prima facie* case – Application dismissed with costs.

Summary: The plaintiff issued summons against the defendant wherein he claimed payment in the amount of N\$120 983.64 plus interests and costs. The defendant was appointed by the plaintiff's insurer to repair the plaintiff's vehicle that was damaged due to sandblasting. Upon delivery of the vehicle to the defendant, the vehicle was inspected. When plaintiff went to collect his vehicle after some time, he was informed that the ECU was damaged. The defendant's representative implied that it was due to wear and tear and the defendant cannot be blamed for the damage to the ECU. The ECU was replaced at the plaintiff's cost and he requested for the damaged ECU to enable him to get a second opinion as to the cause of the damage and the defendant informed him that the damaged ECU was discarded. During his testimony, the plaintiff insisted that the vehicle was in a good working condition when he took it to the defendant.

At the close of the plaintiff's case, the defendant moved an application for absolution from the instance, contending the plaintiff had failed to make out a prima facie case.

Held that when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. Court finds that the plaintiff has made out a prima facie case. Absolution from the instance dismissed with costs.

ORDER

1. The application for absolution from the instance is hereby dismissed with costs.
2. The matter is postponed to **28 January 2021** at **15h00** for status hearing and for the allocation of dates for continuation of trial.
3. Joint status report must be filed on or before 26 January 2021.

JUDGMENT ON ABSOLUTION FROM THE INSTANCE

Introduction:

[1] The plaintiff McDonald Nyamayaro issued summons against the defendant PZN Panelbeaters CC on 25 January 2019. As per his amended particulars of claim the plaintiff claims the following amounts from the defendant:

- a) payment in the amount of N\$ 41 783.64;
- b) payment in the amount of N\$ 79 200.00;
- c) interest and costs.

[2] There was a partial settlement agreement in respect of the plaintiff's first claim and the claim amount in this regard was accordingly reduced to N\$ 12 000.

Background

[3] The prelude to the current claims is that the plaintiff lodged a claim with his insurer, Mutual and Federal, for the repair to his vehicle, a KIA Sportage with registration number N161 948W due to extensive sandblasting sustained by the said vehicle. The plaintiff is a financial advisor by profession and travels the whole country and it would appear that the sandblasting of the vehicle occurred due to the harsh East winds at the coast.

[4] After obtaining two quotations for the repairs of the vehicle, the plaintiff indicated to his insurer that he would want the defendant to be appointed to do the job. The insurer proceeded to appoint an assessor, Mr Ruan Swiegers, who carried out an assessment of the work to be done and gave his approval for the quote and the work to be done. The defendant was subsequently appointed as the service provider for the job. The cost for repairing the sandblasting damage amounted to N\$ 102 237.89 (which amount included the plaintiff's contribution N\$ 5 111.89).

[5] The vehicle was delivered to the defendant's workshop on 21 August 2018 by the plaintiff's partner, Ms Veronika Kasetura. The vehicle was received by the representative of the defendant and was inspected, whereafter the vehicle was left in

the care of the defendant to commence the repair work thereto. The repair completion time of the vehicle was estimated to be approximately two weeks.

[6] The plaintiff had the benefit of a rental vehicle during the period that his vehicle was under repair, courtesy of his insurer.

The plaintiff's claim

[7] The plaintiff testified in support of his claims and called one Mr Gabriel Shilume to testify in respect of the second claim.

[8] The plaintiff testified that his ordeal started upon his return to the defendant's workshop after one week to check on the progress of the work on the vehicle. Although the work was scheduled to take two weeks he needed the vehicle urgently and requested that the work on the vehicle be expedited. So when he returned to the defendant after one week the plaintiff was informed that the defendant required a further two days to complete the work on the vehicle but that all was on schedule and the vehicle would be done in time.

[9] Two days later when the plaintiff arrived at the business premises of the defendant to collect his vehicle, he found the vehicle in the wash bay being cleaned. The work that had to be done in order to repair the sand blasting damage was done, however, he was informed by an employee of the defendant that they were experiencing a problem with the car as it just stopped idling and would not start. He was however assured that they were waiting for an electrician from KIA Motors Dealership to come and inspect the vehicle and that the plaintiff would be called as soon as the KIA electrician was done.

[10] The plaintiff testified that thereafter weeks passed and he did not receive his vehicle back. He then approached the insurance company to make enquiries from Mr Dippenaar, the member of the defendant CC. After a lot of correspondence between the plaintiff, the insurance company and the defendant, the plaintiff resorted to confronting Mr Dippenaar regarding the delay in receiving his vehicle back. When the plaintiff arrived at the office of Mr Dippenaar he was introduced to an elderly

gentleman as a 'TV repair man' and he and Mr Dippenaar were talking about mechanics, electronics and the vehicle's electronic control unit (ECU) (also referred to as the computer box). At the time the ECU was opened and lying on the table. Whilst sitting in the office Mr Dippenaar made a telephone call to the South African dealers in an attempt to find a person to repair the ECU as the quote for the replacement cost of the ECU was N\$ 41 783.64.

[11] The plaintiff testified that all this took place without consulting him or obtaining his approval. The plaintiff further testified that he was upset because he delivered a vehicle in good working order to the defendant's workshop, yet during the meeting with Mr Dippenaar it was implied that he had an old car and that the issues with the ECU were due to wear and tear and that the defendant cannot be blamed for the damage to the ECU.

[12] The plaintiff testified that he then reported back to his insurer what occurred at the office of Mr Dippenaar and what he had observed there. Then during January 2019 the plaintiff approached the mechanical department of the KIA Dealership with the intention of finding out what their professional view was on what could have caused the breakdown/damage to the ECU. To his surprise the plaintiff found his vehicle abandoned in the Dealership's parking lot. The plaintiff returned to his insurer and determined that the claim for the repair of the sandblasting damage was already settled in November 2018, yet his vehicle was still not in running condition. He also determined that the defendant attempted to lodge a claim against the warranty on his vehicle.

[13] The plaintiff decided to seek legal advice and after the exchange of correspondence the plaintiff was informed via email from the defendant on 14 January 2020 that his vehicle was ready for collection. The email had two invoices attached thereto, namely an invoice in the amount of N\$ 12 099.50 for the ECU (which was replaced) and one in amount of N\$ 5 313.55 for the insurance excess levy which was payable by the plaintiff. On the advice of his legal representative the plaintiff settled the two invoices and collected his vehicle.

[14] The plaintiff testified that upon collecting his vehicle he was handed all the old car parts, which were replaced during the repair of the vehicle in respect of the sandblasting damage, but he did not received the damaged ECU. Upon enquiries from the defendant he was informed that the old ECU was thrown away and he was therefore unable to obtain a second opinion as to what caused the damage to the ECU.

[15] In respect of the ECU that had to be replaced, the plaintiff testified that he prays for judgment in the amount N\$ 12 099.50 as he paid the said amount in order to get his vehicle back and does not regard this payment as an admission of liability. The plaintiff was of the opinion that this amount, albeit greatly reduced from the initial quotation, was due and owing to him. The plaintiff repeatedly reiterated that he brought a vehicle that was in good running condition to the defendant and it was the negligence of the defendant's employees when they effected the repairs to the vehicle that caused the resultant damage to the ECU. The plaintiff testified during cross-examination that even though the majority of the repairs were generally cosmetic in nature it also included the removal of the vehicle's headlights which in turn was part of the electrical/electronic system of the vehicle. The plaintiff denied that the age of the vehicle or the mileage had anything to do with the damage to the ECU.

[16] In respect of the second claim the plaintiff testified that as he only had the rental vehicle for a period of 30 days and needed a vehicle to be mobile he entered into an agreement with an ex-colleague, Mr Gabriel Shilume to rent a vehicle at a rate of N\$ 550 per day which resulted in a claim of N\$ 79 500 for the 9 month period that the plaintiff rented the vehicle, which was the period that the plaintiff's vehicle was in the care of the defendant.

Arguments on behalf of the parties

On behalf of the defendant

[17] Mr Theron argued on behalf of the defendant that the plaintiff failed to make out a prima facie case at the end of the plaintiff's case. He argued that the conduct complained about by the plaintiff is of a technical nature and that the plaintiff is

therefore obliged to call an expert to prove that any conduct by the defendant caused the damage to the ECU of his vehicle but failed to do so and therefore failed in his burden of proof. Mr Theron further argued that the defendant pleaded that it only did cosmetic work to the plaintiff's vehicle, which was unrelated to the electronic system and even if the headlights of the vehicle were removed for purposes of repairing the sandblasting damage such lights run on a separate system than the ECU and could not cause any damage to the ECU.

[18] Mr Theron argued that the plaintiff's vehicle was four and a half years old at the time when it came to the defendant's workshop for repairs and already accumulated over 220 000 km and for this reason the ECU was no longer covered by the vehicle's warranty and having regard to the age and mileage of the vehicle it had experienced a lot of wear and tear.

[19] Mr Theron further argued that the plaintiff failed to prove that any of the conduct of the defendant caused damage to the ECU and that applying *bonis mores* test for reasonableness it would be too remote to attribute the damage to the ECU to the defendant merely because the vehicle was in its possession. Counsel further argued that damage to the ECU is too remote to be connected to the actual work done to the vehicle of the plaintiff. Counsel argued that even though there would be a duty of care on the defendant the plaintiff cannot rely on such duty of care due to the remoteness of the possibility of damage.

[20] Counsel submitted that the plaintiff failed to prove that any conduct of the defendant was a condition *sine qua non* for the damage to occur. Counsel further submitted that the plaintiff did not prove that any specific action taken by the defendant led to the ECU short circuiting and reiterated that the plaintiff required expert evidence in order to prove same the nexus between the conduct and the damage was not proven.

[21] On the issue of the damages claim, Mr Theron argued that the plaintiff failed to prove his damages as the costs of the ECU were paid and settled in terms of a settlement agreement reached between the parties on 15 May 2019 and that is a clear indication that the plaintiff accepted liability for the payment of the replacement

ECU. In respect of the second claim, Mr Theron argued that the agreement was a simulated agreement and that the plaintiff failed to provide the court with documentary proof of the payments in question.

[22] As a result Mr Theron prayed that absolution be granted from the instance in respect of both claims, with costs.

On behalf of the plaintiffs

[23] Mr Bangamwabo argued strongly against the granting of the application for absolution and submitted that the arguments advanced on behalf of the defendant in support of its application is bad in law. In support of his argument Mr Bangamwabo submitted that the defendant, in response to the plaintiff's claim set out a special defence in its plea and as a result there is an onus on the plaintiff to prove his defence.

[24] Mr Bangamwabo further submitted that the plaintiff's claims are contractual and not delictual as contended by the defendant in its heads of argument and that the present claim arose from a contractual relationship between the parties and that on the basis of the contract between the parties the defendant had a general duty of care to prevent loss/damage to the plaintiff's motor vehicle which was entrusted to the defendant for repairs.

[25] Mr Bangamwabo strongly argued that the argument by the defendant that it cannot be held liable for damaged ECU because they were only contracted to carry out cosmetic repair work to the vehicle is without merit and at variance with the duty of care arising from the contractual relationship between the parties. Mr Bangamwabo argued that this duty of care was violated by the defendant and that the latter ought to disprove the plaintiff's case. Counsel further contended that the application for absolution should be dismissed with cost as there is evidence upon which a reasonable man might find for the plaintiff.

Damages and causation

[26] Mr Theron was adamant in his argument that the plaintiff came to court alleging he contracted with the defendant who did not fulfil the contract but that this is not the case as the contract relates to cosmetic work to the vehicle and the defendant did nothing in respect of the electrical/electronic systems of the vehicle. Mr Theron argued that the plaintiff had to prove the alleged breach committed by the defendant and that the type of evidence to prove damages is of technical nature and the plaintiff had to call an expert to prove the said damages. The plaintiff further had to prove that the defendant went outside the scope of the contract and caused damage to the vehicle's electrical system.

[27] I have considered the aforementioned argument on behalf of the defendant however in this regard I only need to refer to *Minister of Safety and Security v Van Duivenboden*¹ (a delict case)² wherein Nugent JA noted that it should be remembered that a plaintiff 'is not required to establish the causal link (between breaches of an agreement and damages) with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what could be expected to have occurred in the ordinary course of human affairs, rather than an exercise in metaphysics.'

[28] A plaintiff who at the end of a trial can show no more than a probability that he would not have suffered the loss if the contract had been properly performed, will succeed unless the defendant can discharge the onus of proving that there was no such probability³.

The test for absolution from the instance

[29] After the plaintiff closed his case but before the defendant commencing with its own case the defendant may apply for the dismissal of the plaintiff's case and

¹ *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 43 (SCA) 449.

² The inquiry regarding damages and causation in the law of delict and in the law of contract is basically the same and Corbett CJ's restatement of the relevant principles of *International Shipping Co (Pty) v Bentley* 1990 1 SA 980 (A) 700 E-701 A is as authoritative in contract as in delict.

³ *Primesite Outdoor Advertising (Pty) Ltd v Salvianti and Santori (Pty) Ltd* 1999 (1) SA 868 (W) at 881F-882B.

should the court accede to this application the judgment will be one of absolution from the instance⁴.

[30] The Supreme Court judgment of *Stier and Another v Henke*⁵ cites *Gordon Lloyd Page & Associates v Rivera and Another*⁶ wherein Harms JA outlined the test applied when applications for absolution from the instance is sought as follows:

‘...(W)hen absolution from the instance is sought at the close of plaintiff’s case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958(4) SA 307 (T).’ (My underlining.)

[31] Harms JA went on to explain at 92H- 93A⁷:

‘This implies that a plaintiff has to make out a *prima facie* case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972(1) SA 26 (A) at 37G-38A; *Schmidt Bewysreg* 4th ed at 91-2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (*Schmidt* at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is ‘evidence upon which a reasonable man might find for the plaintiff’ (*Gascoyne (loc cit)*) – a test which had its origin in jury trials when the ‘reasonable man’ was a reasonable member of the jury (*Ruto Flour Mills*). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another ‘reasonable’ person or court. Having said this, absolution at the end of a plaintiff’s case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interest of justice.’

⁴ Herbstein and Van Winsen *The Civil Practice in the High Courts of South Africa* 5th Ed at 920.

⁵ *Stier and Another v Henke* SA 53/2008 delivered on 3 April 2012, at paragraph 4.

⁶ *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA), at page 92 paragraphs F – G.

⁷ *Supra* at footnote 6.

[32] The position of the courts in light of the principles set out above is ‘that a trial court should be extremely chary of granting absolution at the close of the plaintiff’s case. In deciding whether or not absolution should be granted, the court must assume that in the absence of very special considerations that the evidence is true. The court will not at this stage of the proceedings evaluate and reject the evidence of the plaintiff. The test to be applied is not whether the evidence led by the plaintiff establishes what will finally have to be established. When the plaintiff relies on an inference the court will refuse the application for absolution unless it is satisfied that no reasonable court can draw the inference from which the plaintiff contends.’⁸

[33] In *Dannecker v Leopard Tours Car & Camping Hire CC*,⁹ Damaseb JP stated the considerations relevant to absolution at closing of the plaintiff’s case as follows:

‘Absolution at the end of plaintiff’s case ought only to be granted in a very clear case where the plaintiff has not made out any case at all, in fact and law;

- a) The plaintiff is not to be lightly shut out where the defence relied on by the defendant is peculiarly within the latter’s knowledge while the plaintiff has made out a case calling for an answer (or rebuttal) on oath;
- b) The trier of fact should be on the guard for a defendant who attempts to invoke the absolution procedure to avoid coming into the witness box to answer uncomfortable facts having a bearing on both credibility and the weight of probabilities in the case;¹⁰
- c) Where the plaintiff’s evidence gives rise to more than one plausible inference, anyone of which is in his or her favour in the sense of supporting his or her cause of action and destructive of the version of the defence, absolution is an inappropriate remedy;¹¹

⁸ Supra footnote 1 at 923.

⁹ *Dannecker v Leopard Tours Car & Camping Hire CC* (I 2909/2006) [2015] NAHCMD 30 (20 February 2015).

¹⁰ *Compare, Supreme Service Station (1969) (Pty) Ltd v Fox & Goodridge (Pty)* 1971 (4) SA 90 (RA) at 92.

¹¹ *Mazibuko v Santam Insurance Co Ltd & Another* 1982 (3) SA 125 (A) at 127C-D.

- d) Perhaps most importantly, in adjudicating an application of absolution at the end of plaintiff's case, the trier of fact is bound to accept as true the evidence led by and on behalf of the plaintiff, unless the plaintiff's evidence is incurably and inherently so improbable and unsatisfactory as to be rejected out of hand.¹²

[34] The fact that a defendant had at that stage not yet given evidence, is often a cogent factor to be taken into account, particularly where the facts are within the peculiar knowledge of the defendant and the plaintiff has made out a case to answer. The matter before me falls within this category.

[35] The vehicle was received by the defendant in good working condition. Certain works were performed on the vehicle, the exact nature of which is neither in the knowledge of the plaintiff nor that of the court. Whilst the vehicle was under management or control of the defendant or its servant(s) the ECU got damaged. This much is common cause but what the cause was for the damage to the ECU is not known. A number of statements and averments were made during cross-examination as a possible explanation for the damage to the ECU, e.g. the high mileage of the vehicle and wear and tear and harsh climate conditions but all this is mere speculation. There is no evidence under oath contradicting the plaintiff's version that the vehicle was damaged whilst in the care and control of the defendant.

[36] The plaintiff was severely criticized for not calling an expert witness to testify as to proving the damages sustained by the ECU and what conduct of the defendant could have caused the damage and under normal circumstances I might have agreed with the defendant, however, it is interesting to note that the plaintiff never received the damaged ECU back from the defendant, in spite of a request to that effect, in order to obtain an expert opinion as to the cause of the damage to the ECU. I am of the considered view that the defence raised by the defendant lies peculiarly within its knowledge and that there is a case for the defendant to answer to. I am further of the view that the plaintiff should not lightly be deprived of his remedy without the court first hearing what the defendant has to say.

¹² *Atlantic Continental Assurance Co of SA v Vermaak* 1973 (2) SA 335 (A) at 527.

[37] I do not deem it necessary at this stage of the proceedings to evaluate and reject the evidence of either the plaintiff or that of Mr Shilume but will do so at the end of the trial. The plaintiff, in order to successfully resist the application for absolution only had to show that a court, applying its 'mind reasonably' to such evidence, could or might find for the plaintiff. I am satisfied that the plaintiff crossed this hurdle successfully and I find that on the evidence and pleadings before me the application for absolution must fail.

[38] Once, having had the opportunity of hearing all the evidence relevant to this matter, I might reach a different conclusion but as for now I am of the view that the defendant has a case to answer to.

Order

1. The application for absolution from the instance is hereby dismissed with costs.
2. The matter is postponed to **28 January 2021 at 15h00** for status hearing and for the allocation of dates for continuation of trial.
3. Joint status report must be filed on or before 26 January 2021.

J S Prinsloo

APPEARANCES

PLAINTIFF:

Mr F Bangamwabo

Of FB Law Chambers, Windhoek

DEFENDANT:

Mr P Theron

Of PD Theron & Associates, Windhoek