



**IN THE HIGH COURT OF NAMIBIA
RULING**

Case Title: DANIE BOTES v PIETER MARAIS T/A MARAIS MOTOR SPARES AND AUTOMOTIVE ENGINEERING	PLAINTIFF DEFENDANT	Case No: HC-MD-CIV-ACT-CON-2020/01890
		Division of Court: High Court, Main Division
Heard before: Honourable Acting Judge Miller		Date of hearing: 10 February 2022
		Delivered on: 14 March 2022
Neutral citation: <i>Botes v Pieter Marais T/A Marais Motor Spares And Automotive Engineering</i> (HC-MD-CIV-ACT-CON-2020/01890) [2022] NAHCMD 109 (14 March 2022)		
Result on merits: Plaintiff's claim is dismissed.		
COURT ORDER		
Having heard Mr F. Erasmus , counsel for the Plaintiff and Mr A. Van Vuuren , counsel for the Defendant on the 10 th of February 2022 and having read the documents filed of record:		

IT IS ORDERED THAT:

1. The plaintiff's claim is dismissed with costs which will include the costs of one instructing and one instructed counsel.
2. The matter is finalised and removed from the roll.

REASONS FOR ORDERS:

[1] The plaintiff instituted action against the defendant seeking the following relief:

[1.1] Payment in the amount of N\$48 000.

[1.2] Interest on the aforesaid amount of the rate of 20% per annum calculated from 23 March 2020 until date of final payment.

[1.3] Costs of suit.

[1.4] Further or alternative relief.

[2] The plaintiff's cause of action arises from the sale of a second-hand engine which the plaintiff purchased from the defendant on 19 February 2020. The purpose for purchasing the engine was to have it installed in a Toyota vehicle owned by the plaintiff. Once the engine had been installed into the vehicle, the plaintiff used the vehicle, *inter alia*, to commute between Windhoek and his farm. On 11 March 2020 and while the plaintiff was on route to his farm the engine became overheated and eventually seized. It is common cause that when the engine failed, the plaintiff had travelled less than 1000 kilometres since the installation of the engine. It is the plaintiff's case that at the time of the sale, the defendant warranted that the engine would not fail within one month or less than 1000 kilometres being travelled.

[3] The plaintiff alleges further that subsequent to the failure of the engine, the defendant agreed to refund the purchase price, which was N\$48 000, to him against the

return of the engine he had bought from the defendant. The plaintiff alleges further that he returned the engine to the defendant and provided his banking details to the defendant in order for the latter to refund the purchase price, which the defendant failed to do.

[4] The defendant admits that it did not repay the purchase price because, so it alleges, it was not obliged to do so. In respect of the warranty the defendant pleads that the warranty was subject to the condition that the plaintiff was obliged to provide the defendant with the kilometre reading of the vehicle within five days, following the date of sale, which the plaintiff admittedly failed to do. The defendant further denies any subsequent agreement that it agreed to refund the purchase price against the return of the defective engine. It alleges that in any event, the engine returned to it by the plaintiff was not complete since several parts had been removed from it in the interim.

[5] The pleadings and the pre-trial order are extensive. However, the issues that remain for determination can readily be distilled to the following:

[5.1] What conditions if any pertained to the warranty that was issued;

[5.2] Did the defendant waive any reliance; upon the warranty; and whether Mr. Booyesen was authorized to do so.

[5.3] Insofar as it may become necessary to decide to issue, whether the engine was returned as a complete unit.

[6] As far as to conditions attached to the warranty are concerned, it is necessary to consider to evidence of the plaintiff and that of Mr. Booyesen, who is a junior salesman employed by the defendant. Mr Booyesen concluded the sale of the engine to the plaintiff.

[7] The evidence of Mr Booyesen is to the effect that at the time of the sale the conditions of the warranty, in written form, were explained to the plaintiff, where after both parties signed the document. It was thereafter attached to the invoice and the original was handed to the plaintiff. The document is brief and printed in bold print and admittedly

bears the signature of both Mr Booyesen and that of the plaintiff. It reads as follows:

'Condition of warranty

Dear Client

In your own interest it is essential that you have the part(s) carrying a warranty fitted by a qualified mechanic at a qualified workshop where a good inspection can be carried out to all accompanying parts relevant to the guaranteed item(s) sold on this invoice or cash sale no. 27456. Please note that the km reading of the vehicle fitted with the parts purchased must be given to the supplier within five (5) days to date of sale. Failure to comply with the above will cause the warranty to be null and void.

CUSTOMER

FOR: MARIS' MOTOR SPARES'

[8] Plaintiff does not dispute that he had signed the document at the time. He contends however that the conditions of the warranty were different from what appears in the written document. His evidence concerning this aspect is inconsistent and unsatisfactory. In evidence he claimed that there were two warranties, which does not accord with the pleadings. He then goes on to say that the only condition pertaining to the warranty was that he was obliged to provide the kilometre reading of the vehicle to which the engine was to be fitted within five days of the date upon which the engine was fitted to the vehicle, which he did. When it was pointed out during the course of argument that there is no evidence as to the date upon which the engine was fitted to the vehicle a different version emerged. Counsel for the plaintiff submitted that the obligation to provide the kilometre reading arose within five days calculated from the date upon which the plaintiff took delivery of the vehicle after the engine had been fitted to it.

[9] In considering the evidence of the plaintiff and the evidence of Mr Booyesen it is in any view abundantly apparent that the evidence of the plaintiff cannot be accepted and it remains unsatisfactory. I accept the evidence of Mr Booyesen, fortified as it is by the written conditions of the warranty to which I have referred.

[10] The shortcomings in the evidence of the plaintiff inevitably spills over onto the allegation that Mr. Booyesen waived any reliance on the warranty and agreed to refund the purchase price regardless. In this regard the evidence of Mr. Booyesen is to some extent supported by the evidence of Mr. Marais.

[11] The onus insofar as this aspect of the case remains on the plaintiff. I consider that the plaintiff failed to discharge the onus upon him. I conclude that the plaintiff failed to prove any waiver on the part of the defendant.

[12] Having come to those conclusions it is not necessary to consider the further issues raised.

[13] I make the following orders:

[13.1] The plaintiff's claim is dismissed with costs which will include the costs of one instructing and one instructed counsel.

[13.2] The matter is finalised and removed from the roll.

Judge's signature:	Note to the parties:
Miller Acting Judge	
Counsel:	
Plaintiff(s)	Defendant (s)
F Erasmus Of Francois Erasmus & Partners Windhoek, Namibia	A Van Vuuren Instructed by Engling, Stritter & Partners Windhoek, Nmaibia