



NOT REPORTABLE

CASE NO: SA 9/2015

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

**BURGERS EQUIPMENT AND SPARES
OKAHANDJA CC**

Appellant

and

**ALOISIUS NEPOLO T/A DOUBLE
POWER TECHNICAL SERVICES**

Respondent

Coram: MAINGA JA, HOFF JA and FRANK AJA

Heard: 6 April 2017

Delivered: 17 October 2018

Summary: The onus in civil proceedings rests on the plaintiff to prove its case on a preponderance of probabilities.

In order to determine whether a plaintiff has discharged this onus, the trial court, where there are two irreconcilable versions, must make findings on the credibility of factual witnesses, their reliability and the probabilities. The trial court must embark upon an exercise to test the plaintiff's allegations against the general probabilities as well as to test the defendant's allegations against the general probabilities in order to determine if the balance of probabilities favour the plaintiff's case.

The court *a quo* made no credibility findings neither did it consider the probabilities. The court *a quo* could only have accepted the evidence on behalf of the plaintiff if it had rejected the evidence on behalf of the defendant. The court *a quo* never rejected the evidence presented on behalf of the defendant.

It is an elementary rule for the production of opinion evidence that an expert witness must lay the basis for the methodology used and processes undertaken in reaching an opinion.

All evidence must be taken into account in considering whether plaintiff has discharged the onus, including the undisputed testimonies of factual and expert witnesses on behalf of the defendant. The court *a quo* failed to do so.

There was failure by plaintiff to call witnesses who could easily have refuted the evidence by the defence's witnesses. In such an instance, a court may draw a negative inference that the failure to call such witnesses was done because the witnesses would not have supported the plaintiff's case. The failure to call a witness may thus strengthen the case of the opposite side on an issue in dispute.

A seller's liability for latent defects is imposed by law and is not dependent upon any contractual consensus between the parties. It is an implied warranty against latent defects in contracts of sale. The implied warranty cannot assist the buyer where no latent defect was proved as in the present instance.

Held on appeal that plaintiff failed to prove its claims on a preponderance of probabilities.

The appeal succeeds and the orders of the court *a quo* are set aside and the claims are dismissed with costs.

APPEAL JUDGMENT

HOFF JA (MAINGA JA and FRANK AJA concurring):

[1] The respondent instituted an action in the High Court in which he sought the following relief:

1. Payment in the amount of N\$586 000 plus interest;
2. Payment of the amount of N\$323 000 plus interest; and
3. Costs of the action.

[2] The parties concluded an agreement for the sale of a back hoe loader which was delivered on 12 September 2011. The plaintiff/respondent cancelled the agreement by means of a summons in August 2012.

[3] The court *a quo* upheld the claim partially, ordering that:

1. N\$390 666 being two thirds of the purchase price, be repaid 14 days after the return of the machine;
2. N\$25 133 be paid in damages, being two thirds of the amounts claimed under two of the five claims for damages; and
3. the defendant to pay the plaintiff's costs.

The appeal is against the whole of the judgment of the court *a quo*.

Amended particulars of claim

[4] The parties are referred to in this judgment as they were cited in the court *a quo*. It was alleged in the amended particulars of claim that, on or about 7 September 2012, the plaintiff and defendant entered into an oral agreement in which certain contractual guarantees were given by the defendant. These guarantees will be referred to later in this judgment. It was alleged that the defendant knew that the plaintiff would not have purchased the machine if the plaintiff was not given the assurances and guarantees mentioned, or if the plaintiff was informed about any latent defect that would render the machine otherwise unsuitable. It was further alleged in the particulars of claim that the defendant failed to inform the plaintiff that:

- (i) long before the machine was delivered to plaintiff, it experienced a serious problem of overheating;
- (ii) on 18 March 2011, some modification was done on the machine's radiator; and
- (iii) on 13 June 2011, at only 33:4 hours, the machine had repair work done to its water heat gauge, heat sensor, vibration HR meter and wipers.

These were material facts, it was alleged, which defendant ought to have disclosed at the time the agreement was entered into.

[5] It was further alleged that the defendant had breached the agreement by:

- (a) misrepresenting to the plaintiff that the machine was of high quality, durable and guaranteed for 12 months or 1500 hours and that it was suitable for the purpose for which it was purchased;
- (b) failing to provide back-up service using manufacturer approved parts;
- (c) failing to come and repair the machine and refusing to take any telephone calls from the plaintiff; and
- (d) doing modifications without any modification bulletin or manufacturer's approval.

It was alleged that, as a direct result of defendant's breach, the plaintiff suffered damages and, as a direct result thereof the plaintiff cancelled the agreement.

Defendant's amended plea

[6] The defendant denied that there was an oral agreement and alleged that the agreement was partly oral and partly written. The defendant pleaded that the written agreement consisted of:

- (a) a written agreement of sale dated 9 September 2011 (Attached as annexure 'A');
- (b) a written warrantee dated 12 September 2011 (Attached as annexure 'B'); and
- (c) a quote by defendant dated 6 September 2011 (Attached as annexure 'C').

[7] Defendant pleaded that the oral express, alternatively implied, alternatively tacit, part of the agreement was that the terms of the agreement would include the content of annexures 'A', 'B' and 'C', and that the plaintiff would diligently perform routine maintenance, such as the regular cleaning of the air filters.

[8] It was confirmed that the defendant warranted that the machine was suitable for digging trenches and that the defendant warranted that the machine had only 37.2 hours running time on the clock.

[9] It was pleaded that the defendant's well-equipped workshop was shown to the plaintiff – it was denied that this fact was guaranteed; it was denied that the defendant guaranteed the quality, durability and performance of the machine. It was pleaded that a discussion about service and spare parts was not elevated to a guarantee or term of the agreement.

[10] It was denied that the agreement contained an implied warranty against latent defects or that the defendant knew that the plaintiff would not have purchased the machine if the said assurances and guarantees had not been given. The defendant denied that it breached the agreement as alleged or in any other way made any misrepresentation that it failed to effect the necessary repairs and to take telephone calls. The defendant pleaded that it is not liable for the alleged damage (raised in claim 2) as it constitutes consequential damage which is specifically excluded in terms of the provisions of the quote – annexure 'C'. The defendant pleaded that the engine of the machine became inoperable due to misuse and that the plaintiff failed to

take necessary steps to ensure that the air filters were clean or to perform regular maintenance as prescribed or at all.

Pre-trial order

[11] In April 2014, the parties' joint proposed pre-trial order was made an order of court. The pre-trial order identified the facts in dispute, facts not in dispute and issues of law:

Facts not in dispute

1. That at all material times during the conclusion of a partly oral, partly written agreement, the written part of the agreement consisting of annexures 'A', 'B' and 'C' to the defendant's plea, the plaintiff acted in person and the defendant was represented by Mr Jan Harms Burger, generally known as Jaco.

2. That the terms of the agreement included the following:
 - (i) The plaintiff undertook to purchase a back hoe loader from the defendant for the amount of N\$586 000;
 - (ii) The plaintiff undertook to pay the said purchase price in three instalments; and
 - (iii) The defendant undertook to demonstrate to the employee of the plaintiff how to operate the machine.

3. The defendant publicly held itself out to be an expert seller of machinery, equipment and spares and related products of the type of machine sold to the plaintiff.
4. The defendant delivered the machine to the plaintiff and provided the demonstration as per agreement on 12 September 2011.
5. That the agreement was cancelled by plaintiff.

The facts in dispute will be dealt with later.

Issues of law (identified in the pre-trial order)

- (a) What were terms of the agreement between the parties.
- (b) Whether the defendant breached the agreement as alleged.
- (c) Whether the plaintiff was entitled to cancel the agreement.
- (d) Whether the plaintiff complied with the terms of the agreement or breached the terms of the agreement.
- (e) Whether the defendant is liable in law to the plaintiff for the damages claimed.
- (f) The plaintiff tenders return of the machine. In the light of the tender, whether an order for restitution of the purchase price is just and equitable considering the condition of the machine and the deterioration in value thereof.

Factual findings of the High Court

[12] At the conclusion of the trial, the presiding judge made the following factual findings as reflected in paras 10, 11, 12, 13, 14 and 15 of his judgment:

- '10 On the totality of the evidence I find that the loader was sold with a latent defect, that is, with a defective cooling system; hence the constant and persistent overheating of the engine of the loader, making it, in my judgement, unfit for the purpose for which the plaintiff bought the loader, that is, as I have said previously, for digging and hoeing of trenches in construction works. In this regard, one should not lose sight of the fact that the plaintiff did not buy the loader in order to drive it on the streets of Windhoek: The loader was bought for the purpose of digging and hoeing of trenches in Aussenkehr. And, I find that the plaintiff knew that: None of the defendant's witnesses testified that when they were sent to attend to the loader they had to enquire from the plaintiff where the site of his construction works were.
- 11 The repairs and modification done to the loader by the defendant and the replacement of vital parts of the loader undertaken by the defendant before delivery of the loader to the plaintiff are important. They point indubitably to the reasonable conclusion that prior to 12 September 2011 ('date of delivery') when the defendant delivered the loader to the plaintiff the loader had a latent defective cooling system, as I have said previously. Take, for instance, the following facts which I accept. Prior to the delivery date the loader experienced a problem of overheating; and so, prior to that date, some modifications were done to the loader's radiator. All this was a failed attempt to correct the latent defect that the loader carried. I do not, therefore, have any good reason to reject evidence on behalf of the plaintiff that the loader had a latent defect.
- 12 As a result of the latent defect in the loader, the loader was beset with continual and persistent mechanical problems which the defendant attempted to solve. On 13 September 2011, barely two days after delivery date the loader started to overheat and the problem was reported to the defendant. Thus, after

the plaintiff operated the loader for some 14 hours after the delivery date the engine of the loader overheated and oil leaked from its cooler. The defendant sent a technician, with a new oil cooler to the site. The technician replaced the cooler on or about 23 September 2011. After the installation of the oil cooler, oil leaked past an O-ring 'which somehow' had been damaged. The O-ring was replaced. All this was done on 23 September 2011, that is, barely 11 days after the delivery date, as aforesaid. All this did not solve the problem of overheating. The defendant's answer was to perform a 250-hour service on the loader when 303 operating hours were on the clock.

- 13 Furthermore, in November 2011 the new cooler which had been installed in September 2011 was removed, and the original cooler, with supposedly improved and modified mountings, was installed. This did not improve matters; and so, on 13 December 2011 a modification was done to a suction flange of the hydraulic oil tank in accordance with instructions from Liu Gong, the Chinese manufacturers of the loader. Thereafter, on 6 January 2012 the oil cooler was replaced and a service performed. At that stage the loader had worked for 746 hours, which means that no 500 hour service was carried out on the loader. As at 13 January 2012 the engine of the loader was not serviceable: it ceased to be serviceable. The defendant's answer to these persistent problems was to commission Mr Bouwer, a defence witness and an automotive engineering technician, to recondition the engine; significantly, it was done not at the request of the plaintiff. In any event, I fail to see any good reason – and Bouwer did not proffer any – why the reconditioned engine was not fully tested by Bouwer when it was installed in the loader. Bouwer tested the reconditioned engine on the floor of his workshop. Accordingly, I find that Bouwer was in no position to say that the problem of persistent overheating and leaking of oil were cured since he did not run the loader while the loader was in motion and while the loader was carrying out the purpose or purposes for which the loader was bought.
- 14 Be that as it may, a new turbo was installed on 15 February 2012 but the problem of overheating stubbornly remained uncured. The defendant's answer was to reinstall the old turbo on 16 February 2012. The problem of overheating

persisted. At this time the loader had clocked 774.4 operating hours. In the course of events, some repair work was done on 30 July 2012. The operating hours stood at 1041. The loader broke down completely and the plaintiff's evidence was that he was forced to hire a replacement machine. This relates to claim 2, and I shall consider it in due course. The plaintiff has by his summons tendered the return of the machine against the return of the purchase price (claim 1). This should be taken into account in determining period of interest in the payment of any amounts by the defendant.

15 It flies in the teeth of common human experience that the loader, sold as brand new and as a machine of high quality and durable underwent some repairs and modifications to solve a problem of overheating before the delivery date and continued to undergo, after the delivery date, major repairs, replacement of parts and eventual reconditioning of the its engine after the loader had been operated for barely five months at which time it had clocked less than 1500 operating hours. In this regard, it must be remembered that common human experience is an important factor in the assessment of evidence. See *Bosch v State* [2001] 1BLR (Court of Appeal), cited with approval in *State v Mannel Alberto Da Silva* Case No. CC 15/2005 (Unreported).'

[13] The judge *a quo* concluded as follows at para 17:

'17 The foregoing factual findings and conclusions thereanent point inevitably to the following reasonable holdings. The defendant represented to the plaintiff that the defendant was selling to the plaintiff a brand new loader of high quality and durable which were false. Furthermore, the defendant breached its warranty – by operation of law – that the loader was merchantable. And, in my opinion, a seller who has held himself or herself up as an expert seller of machinery, equipment and spares and other products associated with or related to the kind of goods that the defendant sold to the plaintiff would know that if the fact that the made-in-China loader had been repaired and certain parts had been modified by the seller in his workshop in Namibia had been disclosed to the plaintiff, the plaintiff, who had been told he was buying a brand

new made-in-China loader, would not have entered into the contract. Doubtless, the representations were material: they went to the root of the contract for they played a major role in inducing the plaintiff to enter into the contract. Putting the misrepresentation and the fact that the loader was not merchantable together, I conclude that the breaches to the contract by the defendant were material, entitling the plaintiff to cancel the agreement.'

Evidence presented in the High Court

On behalf of the plaintiff

[14] Mr Erich Bartsch (Bartsch) testified that he is a diesel mechanic by training and qualified as a diesel mechanic in 1999. He had 14 years' experience and, amongst others, specialised in the maintenance and repair of back hoe loader machines, including the type purchased by the plaintiff from the defendant.

[15] He testified that he personally perused the service reports and records of the relevant back hoe loader and discovered that prior to delivery thereof to the plaintiff, the following happened:

1. On 18 March 2011, some modification was done on the machine radiator; and
2. On 13 June 2011, and only at 33:4 hours, the machine had repair work done to its water heat gauge, heat sensor, vibration HR meter and wipers.

[16] The above have to do with the cooling system through which system the engine temperatures are maintained at ideal levels, not only to ensure optimum performance, but also to protect the engine from overheating.

[17] In his expert opinion, the fact that repair work was carried out is 'eloquent prove' (*sic*) that long before the machine was delivered to plaintiff, it experienced a serious problem of overheating occasioned by latent defects.

[18] Bartsch testified that he personally perused the service reports and records of the back hoe loader and discovered that the following modifications were done without following the manufacturer's specifications:

1. modifications to the fan without any modification bulletin and the cooler has replaced on 25 October 2011; and
2. replaced the cooler and modified the mountings without any modification bulletin or manufacturer's approval on 10 November 2011.

[19] When inspecting the service records, he could not come across any bulletins or indication that such modifications carried the manufacturer's prior approval.

[20] During his perusal of the service reports and records, he discovered that, during the performance of the 250 hours service the following faults were detected:

1. hydraulic pipe leak; and

2. hydraulic cooler leak.

In his expert opinion, these leaks were clear manifestations of the latent defect of that machine.

[21] During examination-in-chief, Bartsch was asked to comment on the content of some of the statements of witnesses intended to be called on behalf of the defendants.

[22] Bartsch was referred to the witness statement of Mr Nicodemus Haitula Nghuulikwa (Nghuulikwa),¹ where Nghuulikwa stated that, on 12 November 2011, he attended to the machine. The total operating hours was indicated as 383.6. On 13 December 2011, Nghuulikwa again attended to the machine. There was no indication what the operating hours were. On 6 January 2012 Nghuulikwa attended to the machine. It reflected the operating hours as 746, when a 500 service was performed on the site. Job card 1904 reflected that Nghuulikwa performed a service on 25 October 2011 at 303 operating hours. Bartsch testified that he did not come across any document which indicated that air filters were ever replaced. Even after the 1000 operating hours' service, he could find none.

[23] Bartsch was directed to further paragraphs in Nghuulikwa's witness statement,² where Nghuulikwa had to attend to the machine on 16 January 2012 for excessive smoke from the exhaust and had removed a turbo from the machine. The

¹ Paras 9, 13 & 14.

² Paras 21, 22 & 23.

operating hours were reflected as 777.3. The machine had worked for 29.7 hours after Nghuulikwa attended to the machine on 6 January 2011, on which date he had found after the service everything to be in order.

[24] Bartsch was referred to the witness statement³ of Mr Salmon Isak Adams, (Adams) where Adams stated that, when he attended to the machine (at 303 operating hours), he noted a leaking hydraulic pipe and a leak to the hydraulic cooler. According to Adams, the leaks were not so serious as to prevent the operation of the machine. Bartsch testified that such leaks must be attended to promptly, but agreed that one would still be able to operate the machine.

[25] During cross-examination Bartsch agreed that operating an engine at excessive temperatures, by dust penetrating the engine, by not performing services at the required intervals, individually at different times or a combination of these factors can cause damage to an engine.⁴

[26] Bartsch was referred to the witness statement of Mr Vincent Bouwer, (Bouwer) a defence expert witness, where Bouwer stated that he opened the engine and made certain findings from which he concluded six points. The first two conclusions were that the engine overheated and that dust had entered the engine through its air intake. There was no evidence that the dust could have entered from elsewhere.

³ Para 9 & 12.

⁴ This was the view expressed by defendant's expert witness, Mr Vincent Bouwer, at para 11 of his witness statement.

[27] Bartsch agreed that the engine overheated and, although he disagreed that dust had entered through the air intake, he could not dispute the fact that dust was indeed found inside the engine. Bartsch agreed that: dust in the engine will cause excessive wear; that piston rings may collapse as a result of overheating; that excessive wear and collapsed piston rings allowed contamination of the engine oil because contaminated oil loses its ability to lubricate; and that excessive wear and collapsed piston rings allowed the engine oil to exit the engine through its exhaust (smoke).

[28] Bartsch agreed that dust can penetrate an engine because of a dirty air filter, but qualified this by stating, that for this to happen, the air filter must be damaged or lose its shape. Bartsch agreed that; the longer the time with which prescribed service intervals are exceeded, the more serious the degradation of the engine oil will be; exceeding a service interval with 193 hours would have seriously harmed the engine; and early performance of the 100 hour service prior to delivery at 37.2 hours could not have caused or contributed to the wear and damage found by Bouwer.

[29] Mr Aloisius Nepolo, (Nepolo) the plaintiff, confirmed the content of his witness statement. In this statement the plaintiff, *inter alia*, stated that, before the parties entered into the agreement, he explained to Mr Jan Harms (Jaco) Burger (Burger) that he was contracted to construct a sewer reticulation system and that the machine was required to enable him to dig trenches for the sewer system.

[30] The plaintiff stated that Burger warranted that the machine was suitable for that purpose and that the period of guarantee was 1500 hours running time or 12 months, whichever occurred first, and Burger had guaranteed that there was a well-equipped workshop and that the service of the machine for the first 100 hours was to be carried out by defendant at defendant's own expense wherever the machine was stationed.

[31] The plaintiff stated that the defendant guaranteed that the service and spare parts were readily available and that it had enough service and spare parts for that machine in stock.

[32] The plaintiff stated that the agreement between the parties contained an implied warranty against latent defects which could render the machine unfit for the purposes for which it was intended.

[33] The plaintiff stated that, after running for only 14 hours, the machine started experiencing problems in that it was overheating and excessive oil quantities started to leak from its cooler. The defendant was immediately informed; a local technician was instructed to attend to the machine and he was subsequently informed that the cause of the problem was the cooler of the machine. The defendant provided a new cooler.

[34] After the new cooler was installed, the problem reoccurred after 3 hours and persisted. The defendant informed him that there was a defect in the hydraulics system and that was the reason for the cooler continuously leaking.

[35] The plaintiff stated that, from the time of delivery to February 2012, the machine continued to experience various mechanical problems manifested as follows:

1. On 13 September 2011, two days after delivery, the machine started to overheat;
2. On 22 September 2011, the defendant replaced the radiator;
3. On 25 October 2011, the defendant performed a service during which a modification was done without any modification bulletin and the cooler was replaced;
4. One week after the service, on 2 November 2011, the defendant replaced the radiator and hydraulic hose;
5. On 10 November 2011 the defendant replaced the cooler and modified the mountings without any modification bulletin or manufacturer's approval;
6. On 11 and 17 November 2011, some repair work was done to the radiator;

7. On 13 December 2011, modifications were done to the suction flange without any modification or manufacturer's approval;
8. On 6 January 2012, the cooler was replaced, by the 13 January 2012 the machine ceased to operate;
9. On 13 January 2012, the turbo of the machine was removed and a new turbo installed on 15 February 2012. The problem of overheating remained which prompted the defendant to reinstall the old turbo but the problems persisted; and
10. On 16 February 2012, the defendant removed the engine, overhauled it, and refitted it on 23 May 2012, but the problem of overheating remained and at the time of deposing to his witness statement, the machine was totally out of order.

[36] The plaintiff stated that he had learned much later that, prior to the delivery of the machine, a certain modification had been done on the radiator without any modification bulletin or manufacturer's approval and, at only 33.4 hours, the machine had repair work done to its water heat gauge, heat sensor, vibration HR meters and wipers.

[37] The plaintiff stated that, on 23 May 2012, and, despite various requests and demands, the defendant failed, neglected and or refused to come and inspect the

machine, to fix it or to replace it and that the defendant, on numerous occasions, refused to take telephone calls from him. This left him stranded and unable to perform his contractual duties in respect of the construction of the sewer reticulation system.

[38] The plaintiff was referred to certain paragraphs of the witness statement of Burger. The plaintiff denied that Burger did not give any verbal guarantees relating to the workshop and testified that he was guaranteed that defendant does not outsource anything in respect of the parts of the said machine.

[39] The plaintiff denied that Burger never gave him an assurance of the quality and durability of the machine and testified that Burger informed him that the machine was the best in the market and that to him was an assurance of good quality and that the machine has a long life span.

[40] The plaintiff denied that Burger demonstrated how to correctly remove and replace the air filter of the machine and testified that Burger had only explained this to him. Burger also informed him how to clean the air filter and radiator core with compressed air. The plaintiff testified that he in any event knew how to do it.

[41] The plaintiff testified in respect of the maintenance requirements that they did the 'general cleaning' and that he was on site most of the time when the technicians of the defendant attended to the machine. The plaintiff denied that, except for the 1041 hours service, there was never a notification or a request regarding any service that was due. Plaintiff testified that he requested for services, but, due to the fact that

the machine had been giving problems, the technicians performed services at intervals, they were not supposed to be performing, and that he had been informed that services were performed when the repairs had been done.

[42] The plaintiff denied that the maintenance requirements had not been fully and diligently performed.

[43] The plaintiff denied that he, for the first time, on 22 September 2011, telephonically informed Burger that there was a leak to the machine's radiator (hydraulic compartment) and stated that he had informed Burger after 14 hours of operation of the machine overheating. According to him, he was informed that, because 'the ambiance temperature in Aussenkehr is high', they should work the machine for three hours and then let it cool down.

[44] The plaintiff testified that, after a new radiator had been installed by the defendant, the new radiator continued to leak – it had a crack. The defendant informed them to take the radiator to a place where it could be welded. They went three or four times to Keetmanshoop to have the radiator welded.

[45] The plaintiff testified that, when the radiator leaked, the oil spilled onto the radiator coil and dust got stuck on the radiator itself but, in spite of these conditions, they tried to keep the radiator clean.

[46] The plaintiff testified that he was never informed orally, or in writing, that the warranty has been voided because of a service which was due on 250 hours had only been done at 303 hours – 53 hours overdue. According to the plaintiff, he had informed the defendant prior to the 250 hours service but that defendant had delayed the service.

[47] The plaintiff with reference to a job card⁵, which reflected a water heat gauge and water heat sensor had been changed on the machine, on 13 June 2011 prior to the conclusion of the sale agreement, expressed the view that the defendant had known already at that stage that the engine was overheating.

[48] The plaintiff denied that Burger offered to buy the machine back and that he was not agreeable to that offer and stated that he had proposed to Burger to give him a machine to finish his job whilst they were waiting to repair the engine.

[49] The plaintiff was directed to the witness statement of Nghuulikwa. The plaintiff confirmed that Nghuulikwa, with reference to a job card⁶, attended to the machine on 12 November 2011 in order to install a mounting. According to plaintiff, he was present. The total operating hours were correctly depicted⁷ as 383.6. Plaintiff complained that he had not beforehand been informed of the visit by Nghuulikwa and stated that a modified mounting was installed.

⁵ Card J 0641.

⁶ Job card J 1924.

⁷ A photograph taken by Nghuulikwa.

[50] The plaintiff confirmed that Nghuulikwa was on the site on 13 December 2011 to do a modification of the machine and that the operating hours were 564.5. No service was performed on this day. The plaintiff testified that, between 12 November and 13 December 2011, no technician of the defendant was on site. On 17 November 2011 the plaintiff took the cooler to Keetmanshoop for repairs.

[51] The plaintiff confirmed that, on 6 January 2012, Nghuulikwa attended to the machine to do a 500 hours service. According to plaintiff, he had informed the defendant prior to 3 December 2011 that the machine needed to be serviced. The job card⁸ reflected the detail of the work done and that the operating hours stood at 746.

[52] The plaintiff testified that the agreement with the defendant was that the engine would be serviced at 250 hours intervals, but that the engine was never serviced on time in spite of requests by the plaintiff to that effect. According to the plaintiff, the defendant informed him to keep on working until the defendant would come to do a service or a modification or repairs. Furthermore, the defendant gave him authorisation to continue working with the machine.

[53] The plaintiff testified that on 6 January 2012, he was not on site but left the operator of the machine in charge in his absence. According to the plaintiff, the operator did not inform him that technicians came to the site on 6 January 2012, neither was he informed that the gauge, indicating when the air filter requires cleaning, was found to be in the red.

⁸ Job card J 1985.

[54] The plaintiff complained that the technicians employed by the defendant never replaced the air filter when they did the services. Only the oil filter was replaced.

[55] The plaintiff disagreed with the statement in the witness statement of Nghuulikwa, that the daily maintenance of the machine was not performed by the operators.

[56] The plaintiff testified that he had hired machines in other projects, but never experienced a problem of overheating nor of the radiator cracking. According to him, he experienced no problem with the replacement machine he had hired for the project at Aussenkehr.

[57] The plaintiff testified that, on 16 January 2012, the engine of the machine was removed by the technicians. He was not on site and had never been informed thereof.

[58] The plaintiff testified that, during the period 29 – 31 May 2012, when the engine was re-fitted and given a 1000 hours service, he was not on site since he had not been informed that the technicians would be coming. According to the plaintiff, the 1000 hours service was done when the operating hours stood at 781 hours. Previously, a 500 hours service was done when the operating hours stood at 746 hours.

[59] The plaintiff was directed to the witness statement of Adams, who stated that, on 25 and 26 October 2011, he attended to the plaintiff's machine. The operating

hours stood at 303 hours. He discovered that a large amount of dust had accumulated on the outside of the radiator which blocked the openings in-between the fins and prevented airflow through the radiator. In his assessment, this was the cause of the overheating of the machine. Adams stated that the removal of dust from the radiator is a daily routine in respect of maintenance to be performed, and that it was clear to him that this was not done. The plaintiff denied that this was not done.

[60] The plaintiff was also referred to the witness statement of Burger in which Burger denied that he had orally given the guarantees to which the plaintiff referred. It was further put to the plaintiff that his assertion, that Burger knew or ought to have known that plaintiff would suffer damages if maintenance and repairs were not performed speedily, would be denied by Burger as being part of the agreement.

[61] The plaintiff was referred to clause 16 of the agreement of sale which provides that the (written) agreement constitutes the entire agreement between the parties and no other term will be binding unless reduced to writing and signed by the parties. It was pointed out to plaintiff that the effect of this clause was that the oral guarantees allegedly given by Burger would be excluded from the agreement. It was further pointed out that although the defendant had pleaded that the agreement was partly oral and partly written, the oral expressed, alternatively implied, alternatively tacit, part of the agreement was first that the terms of the agreement would include annexures A, B and C and, secondly, that the plaintiff would diligently perform routine maintenance, such as the regular cleaning of the air filter.

[62] The plaintiff was informed that, at the conclusion of the case, counsel would argue that all the damages claimed under claim 2 are consequential damages which the plaintiff was precluded from claiming from the defendant – this was part of the written agreement.

[63] The plaintiff conceded that he had not been on the site all the time but estimated to have been on site 90% 'of the time'. Plaintiff was unable to state how many hours the machine would be operated on a typical day.

[64] The plaintiff was referred to one of the alleged breaches of the agreement as reflected in his particulars of claim, namely that the defendant failed to come and to repair the machine and refused to take telephone calls. The plaintiff conceded that the technicians had been there on a regular basis, but complained that they did not repair the machine 'quick enough'. The plaintiff complained that the defendant did not take his telephone calls in order to inform him what the success of the repairs was and, on this basis the defendant failed him. It was put to the plaintiff that the alleged warranty of speedy performance was never part of the agreement.

[65] It was pointed out to the plaintiff that, in respect of the damages claim (claim 2), the plaintiff claims an amount of N\$19 250 in respect of fuel for travelling to the site and back in order to transport the cooler between Keetmanshoop and Aussenkehr but that this is not contained in his witness statement nor in his particulars of claim, although he testified about it.

[66] The plaintiff, in his testimony-in-chief, was referred to a paragraphs in the witness statement of Burger⁹ which created the impression that, between 22 September 2011 and 25 October 2011, the engine ran smoothly. The plaintiff denied this and testified that, during this period, the radiator was cracked and was leaking with the result it had to be taken to Keetmanshoop for welding; he referred to certain invoices to confirm this. During cross-examination, it was pointed out to the plaintiff that those invoices do not relate to the period 22 September to 25 October 2011, but to a later period. The plaintiff conceded this and testified that he lost those invoices relating to the period 22 September to 25 October 2011.

[67] The plaintiff was referred to his claim for N\$15 950 for transport services to transport a cooler from Okahandja to Aussenkehr. During cross-examination, the plaintiff explained that this amount reflects the kilometres travelled from Okahandja to Aussenkehr and back to Windhoek at a rate of N\$4,50 per kilometre. The plaintiff was given the opportunity to do a calculation after which plaintiff stated that the amount was N\$8 275,75. It was put to the plaintiff that the actual amount was N\$7 933,50. The plaintiff conceded that he made a mistake in the calculation. The plaintiff was given the opportunity to look at the calculations made by defence counsel and was given the opportunity to respond thereto the next day. The next day, during re-examination, neither the plaintiff nor his legal representative commented on or contested these calculations.

⁹ Paragraphs 30 & 31.

[68] The plaintiff was referred to his witness statement in which he stated that, on 16 February 2012, the defendant removed the engine, overhauled it and refitted same on 23 May 2012, but the problem of overheating remained and, to date, the machine is totally out of order'. The plaintiff was asked what he meant by 'to date' and he answered that up to the time he made the statement the machine was out of order, and added: 'And until now it is'. The plaintiff testified that he stopped using the machine.

[69] The plaintiff was referred to the witness statement of Burger in which he stated that he received the engine back from Vehicle Solutions on 23 May 2012 and he sent Nghuulikwa to Aussenkehr on 28 May 2012 to reinstall the engine and to perform a comprehensive service. The service was completed at 781 hours. Burger stated further that he did not hear again from plaintiff until July 2012 when plaintiff requested to be provided with a quotation for a service and replacement of an ignition. The quotation was accepted on 16 July and the work carried out on 20 July 2012. The machine reflected an operating time of 1041 hours. Burger stated that this was the first ever request received from the plaintiff for the service of his machine.

It was put to the plaintiff that the machine had worked 260 hours since the engine had been refitted. The plaintiff replied that the leaking and overheating continued, but that Burger informed him to work the machine for three hours and then rest it for three hours.

[70] It was further pointed out to the plaintiff that, according to his further particulars the operating hours of the machine stood at 1500 hours on 14 November 2012. It was

further put to the plaintiff, that if the machine had worked for five days per week from 12 September 2011 (when he received the machine) until 15 January 2012, the machine had worked 8.22 hours per day.

[71] It was put to the plaintiff that both Nghuulikwa and Adams will testify that, every time they came to the site, the radiator was dirty and blocked and the air filter was dirty. The plaintiff disagreed.

[72] The plaintiff was referred to the statement of Bouwer (employed by Vehicle Solutions) who stated that, in order to prepare the quotation, he opened the engine and found: excessive wear to pistons, piston rings, sleeves, cylinder head valves and valve guides of the engine; the piston rings were collapsed and could no longer effectively separate the combustion chambers and oil sump of the engine; and dirt had accumulated within the piston grooves, causing the collapsed piston rings to cling to the pistons and that dust contaminated the engine oil and the oil was dirty.

[73] Bouwer concluded that the engine overheated; that dust entered the engine through its air intake (there was no evidence that the dust could have entered elsewhere); the aforesaid caused excessive wear within the engine; piston rings collapsed as a result of overheating which in turn allowed contamination of the engine oil which in turn loses its ability to properly lubricate. The plaintiff could not dispute this.

[74] The plaintiff was referred to the quote he accepted on 20 July 2012 for the service of the engine (operating hours stood at 1041 hours) where no mention was made of the engine overheating or of an oil leak. The plaintiff replied that the lack of that information did not mean that he had not informed defendant orally that the machine was still having the same problem since the beginning.

[75] The first defence witness called was Nghuulikwa. He is a qualified diesel mechanic employed by the defendant.

[76] He testified that, on 10 November 2011, he attended to plaintiff's site at Aussenkehr where he intended to install a new cooler. However, when he arrived there, a new cooler had already been installed and he then installed new mountings.¹⁰ One John Shadika signed the job card on behalf of plaintiff. He took the old cooler with him to Okahandja. The cooler looked dirty (yellowish and reddish) as a result of dust. He testified that, in order to change the mountings, he had to remove the cooler. Afterwards, he refilled the cooler with water and anti-freeze and then the machine was tested. The machine was working properly.

[77] On 13 December 2011, he attended to the machine at Aussenkehr in order to effect a modification to the hydraulic oil pipe. After the modification had been done, he tested the machine and also observed the plaintiff's operator operating the machine for more than an hour. It worked properly. There was no oil leak.

¹⁰ Job card J 1924.

[78] On 6 January 2012 he performed a 500 hours service on the machine at Aussenkehr.¹¹ He discovered that: the operating hours stood at 746 hours; the air filter of the machine was very dirty; and the air intake of the machine has a gauge indicating when the air filter requires cleaning. He found the gauge in the red – this indicates danger and the machine is never to be operated when the gauge so indicates. He cleaned the air filter and reinstalled it. He started the engine and the gauge indicated green. According to Nghuulikwa, he asked the operator why the indicator was in the red – nobody could answer him and it seemed to him that nobody understood the purpose of that light. He was informed that the machine has no power and, according to him, he explained to the operator that it was because the red light indicator shows that the air filter is dirty. Nghuulikwa confirmed inscriptions in the ‘Operation and Maintenance Manual’ to the effect that a red diaphragm alerts the user to the need for air filter cleaning or replacement whereafter the ‘air filter restrictions indicator’ had to be reset. After the service, the machine was tested by operating the machine and he found everything in order. Nghuulikwa testified that it was clear to him that the required daily maintenance of the machine was not performed by the operators of the machine.

[79] Nghuulikwa testified that he did a 1000 hours service on the machine.¹² The operating hours stood at 1041 hours. According to him, he could not remember any complaint about overheating or oil leakages. Nghuulikwa testified that, during the times he had attended to the machine at Aussenkehr, he had never seen the plaintiff.

¹¹ Job card J 1985.

¹² Job card J 940.

[80] During cross-examination, Nghuulikwa explained, that when he did the 500 hours service on 6 January 2012, he cleaned the air filter, but this fact was not recorded on the job card.

[81] It was put to Nghuulikwa that, on 6 January 2012, it was his imagination that the indicator was in the red and that the air filter was dirty. He replied that he was told that the machine had no power and, after he had cleaned the air filter and did some other repairs, the machine was tested and it worked properly.

[82] It was pointed out to Nghuulikwa that, according to his witness statement, he attended to the machine of the plaintiff at Aussenkehr about six times and on only two occasions did he mention the issue of a dirty air cleaner. The question was then asked, in view of his training and experience, what in his expert view could be the reason why the machine gave 'persistent problems'. His reply was because of a dirty air cleaner and a dirty radiator.

[83] Adams was a qualified mechanic employed by the defendant. Whilst so employed, he on two separate occasions worked on and serviced the backhoe loader which belonged to the plaintiff, and was assisted by an assistant mechanic, Mr Jakobus Meyer, (Meyer) employed by the defendant.

[84] He testified that the first occasion was during the period 25 to 26 October 2011, when he was instructed by Burger to attend to the machine because the recorded problem with the machine was stated as 'overheating'. He was instructed to

install an electrical fan to the radiator additional to the standard belt-driven radiator fan and to do a 250 hours service.

[85] Upon inspection of the operating hour meter, he found it at 303 hours. This was recorded on the job card.¹³ He further found that a large amount of dust had accumulated on the outside of the radiator which blocked the openings in between the fins thereof and prevented air flow through the radiator as a result, the radiator was blocked. They cleaned the radiator and tested it. The engine did not overheat. In his assessment, the blocked radiator was the cause of the overheating of the engine. The removal of dust from the radiator is a routine daily maintenance task to be performed. It was clear to him that this was not done.

[86] According to Adams, he also noticed leaks to the hydraulic cooler. The leaks were on the hydraulic oil compartment of the radiator. He explained that the machine's radiator has three separate compartments through which water, transmission oil and hydraulic oil respectively flows. The leaks to the hydraulic oil compartment were not so serious that they prevented the machine from being operated. He testified that the leak in the hydraulic side of the radiator could not have caused the engine to overheat.

[87] Adams was informed of the opinion of Bartsch that the hydraulic oil leaking could splash onto the radiator and thereby cause the dust to stick to the radiator

¹³ Job card J 1904.

which caused the blockage. He disagreed, stating that the oil spillage would be blown to the back of the machine.

[88] Six days, later he travelled to Aussenkehr in order to replace the leaking hydraulic hose and to replace the radiator, by then the machine reflected 335 operating hours which hours he recorded in his diary. He testified that during these two visits at the site, he had never met the plaintiff. Adams testified that there was a crack on the hydraulic side of the radiator, not on the water side.

[89] During cross-examination, Adams testified that Burger had informed him to perform a 250 hour service because the engine was overdue with its service. Adams assumed that the plaintiff must have informed Burger about the overdue service.

[90] Adams testified that the dirt which he found on the radiator on 25 October 2011 would normally accumulate over a period of 2 – 3 days since the machine worked in a dusty environment.

[91] Burger was called as a 'factual' and as an expert witness. He was employed as the general manager of the defendant. He confirmed two witness statements as his evidence-in-chief.

[92] Burger was directed to the testimony that the engine was serviced at 747 hours and thereafter everything was in order. At 777 hours, the engine of the machine had broken down to the extent that the engine had to be reconditioned, ie 30 hours

later. Burger explained that, from experience, it is indeed possible something so dramatic can happen within 30 hours as a result of dust.

[93] Burger testified that, prior to the sale of the machine to the plaintiff, a modification - an improvement, was done to the water radiator. According to Burger, his expert opinion was that, if there is a leak in the hydraulic side of the radiator, it is impossible for the oil to settle on the water compartment of the radiator because of the function of a blow fan.

[94] Burger testified that there was no agreement between him and the plaintiff that he would provide a replacement machine to the plaintiff.

[95] Burger denied that he informed the plaintiff when the machine was at 564 operating hours that the engine would be serviced at a later stage. He also denied that he had told the plaintiff to work with the machine for three hours and thereafter to let it cool down. According to him, this could have led to bigger damage to the engine.

[96] Burger testified that there is nothing wrong for the machine to run 8.22 hours per day. Burger further testified that, when he sold the machine to the plaintiff, the engine had no latent defect.

[97] During cross-examination, Burger confirmed that he sold a new machine to the plaintiff and that, prior to the sale, he replaced the radiator because a similar machine sold in Botswana had overheated. He, however, could not remember if the plaintiff

had been informed of this replacement even though he regarded such information as important.

[98] Burger was referred to his witness statement in which he stated that, after the delivery of the machine to the plaintiff (on 12 September 2011), the plaintiff telephonically informed him, on 22 September 2011, (10 days later), that there was a leak to the radiator's hydraulic compartment. The question was whether it was normal to experience such a problem so soon. Burger replied that any machine can develop any problem.

[99] Burger confirmed that, on 25 October 2011, he sent Adams and Meyer to Aussenkehr because the overheating of the engine was reported and that they performed a service on his instructions. According to Burger, a service would only be performed on request in most instances by the operator of the machine. Burger denied that he had refused to take telephone calls from the plaintiff. Burger confirmed that the engine of the machine was removed and reconditioned, and subsequently refitted to the machine by Nghuulikwa.

[100] Burger was referred to a paragraph in his witness statement where he stated: 'I, at those times did not take or respond to the plaintiff's calls, which were simply a repeat of earlier enquiries'. Burger insisted that he never deliberately avoided taking calls from the plaintiff.

[101] Burger testified that the water compartment of the radiator of the plaintiff's machine was never removed – only the hydraulic compartment of the radiator was removed.

[102] During cross-examination, Burger testified that he had left the employment of the defendant during January 2014; and that, when at the time of his employment, he had sold three or four similar machines and, until he had left, they had not experienced any problems.

[103] Burger testified that he had never been confronted by the plaintiff and never received any communication from the plaintiff in which the plaintiff had complained that Burger had refused to take a call and, therefore, the service was late.

[104] The last witness called by the defendant was Bouwer who testified that he had 25 years automotive experience during which time he gained extensive knowledge of and experience in the servicing, repair, reconditioning overhauling and rebuilding of both petrol and diesel engines.

[105] Whilst employed at Vehicle Solutions CC in Windhoek, he was requested by Burger to provide the defendant with a quotation for work to be carried out on a 4 cylinder Deutz diesel engine, model no. TD 226 B. A quotation was prepared and accepted by Burger.

[106] On 13 April 2012, he commenced with work on the engine which consisted of a complete overhaul and rebuild of the engine; he completed the work on 23 May 2012.

[107] Bouwer testified that he opened the engine and found what is reflected in para 74 (*supra*). The damage and wear of the type found, according to Bouwer, can be caused by operating an engine at excessive temperatures, by dust penetrating the engine, by not performing services at the required intervals and by a combination thereof. A combination of these factors, present at the same time, will drastically increase the rate of wear to an engine. Even if not present at the same time and each causing damage separately at different times, the combined damaging effects of these factors will increase the rate and extent of wear to an engine.

[108] According to Bouwer, he concluded that the engine overheated; dust entered the engine through its air intake (there was no evidence that the dust could have entered elsewhere); these caused excessive wear within the engine; the piston rings collapsed as a result of overheating; the excessive wear and collapsed piston rings allowed contamination of the engine oil; and the excessive wear and collapsed piston rings allowed the engine oil to exit the engine through its exhaust system.

[109] According to Bouwer, a leak to the hydraulic system of the engine's machine, even on the radiator, could not have caused, or contributed to, overheating of the engine, or the wear and damage he found.

[110] Bouwer was referred to the testimony of Bartsch to the effect that the problems experienced by the engine was a result of a latent defect in the engine. Bouwer

testified that, when he opened and reconditioned the engine, he did not find any latent defect.

[111] During cross-examination, Boucher was asked what the cause of the overheating was and he replied stating that it was due to the amount of dust that was in the engine. Boucher stated that an air filter of a machine which was operated in those conditions needed to be cleaned every morning and that the replacement of the air filter should be done as dictated by the service book.

Boucher confirmed that he did not work on the radiator system and was thus not in a position to express an opinion in respect of the effectiveness or otherwise of the cooling system.

The onus in civil cases

[112] In *National Employers General Insurance Co. Ltd v Jagers*¹⁴ Eksteen AJP stated the following in respect of the onus in civil cases at 440D-G:

'It seems to me, with respect, that in any civil case, as in any criminal case, the *onus* can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the *onus* rests. In a civil case the *onus* is obviously not as heavy as it is in a criminal case, but nevertheless where the *onus* rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfied the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will

¹⁴ 1984 (4) SA 437 (E) a full bench decision of the Eastern Cape Division.

accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

[113] Two versions are mutually destructive if the acceptance of the one must necessarily lead to the rejection of the other.¹⁵

[114] In *Sakusheka & another v Minister of Home Affairs*,¹⁶ Muller J referred with approval to the case of *Stellenbosch Farmers' Winery Group Ltd & another v Martell et Cie & others*,¹⁷ where the Supreme Court of Appeal of the Republic of South Africa stated that, where there are two irreconcilable versions in a civil matter, in order to come to a conclusion on the disputed issues, a court must make findings on (a) the credibility of various factual witnesses; (b) their reliability; and (c) the probabilities.

The findings of the court *a quo* and the evaluation thereof

[115] The court *a quo* found that there were misrepresentations by the defendant that the loader was of high quality and durable. It was found that these representations were material for they played a major role in inducing plaintiff to enter into the contract. The court *a quo* found that the defendant remained silent about the fact that the loader had been repaired and certain parts had been modified by the defendant in his workshop prior to the sale to the plaintiff.

¹⁵ *Mabona & another v Minister of Law and Order & others* 1988 (2) SA 654 (SE) at 662C-E.

¹⁶ 2009 (2) NR 524 (HC).

¹⁷ 2003 (1) 11 (SCA) at 14I-15D.

[116] In respect of the findings of repairs and modification done prior to delivery, the court *a quo* heard the evidence of Burger. Burger testified that, prior to the sale of the machine to the plaintiff, a similar machine sold to a client in Botswana had overheated. When this was taken up with the manufacturer of the machine, it was discovered that there had been a redesign of the radiator of which the defendant had not been informed of by the manufacturer. This new radiator had a larger water compartment and core than the old radiator. The manufacturer sent such a replacement radiator which was fitted to the machine prior to the sale thereof to the plaintiff. Subsequently, a heat gauge and a heat sensor supplied together with the replacement radiator were installed. A fibration hour meter was installed to ensure the measurement of the operating hours of the machine even when the factory fitted hour meter do not function properly. The replacement radiator was an improvement over the old radiator. Burger testified that before the sale thereof to the plaintiff, the machine at no stage overheated.

[117] The testimony of Burger, in this regard, was unsurprisingly not refuted by any other evidence. There was thus no evidence presented to the court *a quo* of any *repairs* or any overheating of the machine prior to the sale. The finding of the court *a quo* that, prior to the sale thereof, the loader experienced a problem of overheating is supported by no evidence at all. The undisputed evidence is that the radiator was *replaced*, not because of overheating, but because the manufacturer of the machine had done a redesign of the radiator, which was an improvement over the previous radiator.

[118] The allegation in plaintiff's particulars of claim that, long before the machine was delivered to the plaintiff, it experienced a serious problem of overheating is factually incorrect. This alleged misrepresentation was never proved. The plaintiff accepted during cross-examination that the modification (ie the new radiator) was approved by the manufacturer. The plaintiff also accepted that the heat gauge and heat sensor were installed to suit the redesigned radiator.

[119] The question is whether the defendant ought to have disclosed to the plaintiff, at the time the agreement was entered into, the replacement of the radiator together with the heat gauge and heat sensor.

[120] In my view, there was no obligation on the defendant to disclose the improvement. The failure to do so could not have negatively affected the decision of the plaintiff to purchase the machine. On the contrary, a larger radiator with a corresponding gauge and sensor would have persuaded the plaintiff to purchase the machine as it was an improvement.

[121] In *ABSA Bank Ltd v Fouche*¹⁸ Conradie JA stated the following at para 5:

'The policy considerations appertaining to the unlawfulness of a failure to speak in a contractual context – a non-disclosure – have been synthesised into a general test for liability. The test takes account of the fact it is not the norm that one contracting party need tell the other all he knows about anything that may be material (*Speight v Glass and Another* 1961 (1) SA 778 (D) at 781H-783B). That accords with the general rule that where conduct takes the form of an omission, such conduct is *prima facie* lawful

¹⁸ 2003 (1) SA 176 (SCA) – the majority judgment.

(*BOE Bank Ltd v Ries* 2002 (2) SA 39 (SCA) at 46G-H). A party is expected to speak when the information he has to impart falls within his exclusive knowledge (so that in a practical business sense the other party has him as his only source) and the information, moreover, is such that the right to have it communicated to him 'would be mutually recognised by honest men in the circumstances' (*Pretorius and Another v Natal South Sea Investment Trust Ltd (under Judicial Management* 1965 (3) SA 410 (W) at 418E-F).'

and continues as follows at para 9:

'Assuming, however, that the information could be characterised as 'exclusive' the question remains whether an honest person in the position of the branch officials would have thought to communicate it to a future depositor. The answer to that question depends upon how an honest person would have assessed the circumstances, and evaluated the duties which they cast upon him, *in accordance with the legal convictions of the community*¹⁹ (*McCann v Goodall Group Operations (Pty) Ltd* 1995 (2) SA 178 (C) at 726A-G).'

[122] I am of the view that, even if it is accepted that defendant had 'exclusive' information, his non-disclosure thereof in the circumstances cannot be elevated to a legal duty to speak, since, as it was stated in *Woodstock, Claremont, Mowbray and Rondebosch Councils v Smith* (1909) 26 SC 681 at 701, a misrepresentation must, *inter alia*, be made 'with the object of concealing from him facts the knowledge of which would be calculated to induce him to refrain from entering into the contract.'

[123] The case of the plaintiff on misrepresentation as it appears from its particulars of claim and the testimony of Nepolo was based upon a misunderstanding of the purpose and reason for the replacement of the radiator.

¹⁹ Emphasis provided.

The latent defect and overheating

[124] The court *a quo* found that the loader was sold with a latent defect, namely a defective cooling system, 'hence the constant and persistent overheating of the engine of the loader, making it, . . . unfit for the purpose for which the plaintiff bought the loader'

[125] It was submitted by Mr Rukoro, who appeared on behalf of the respondent on appeal, that the radiator had to be attended to more than five times in a period of five months and that overheating can logically only be contributed to a failing cooling system of the engine. This submission was based on the plaintiff's witness statement in which he referred to five instances within a period of five months where the defendant had replaced the radiator/cooler. The impression is created that the cooling system was replaced five times. This is, however, factually incorrect since as it was explained by defendant's witnesses that, the radiator of the machine consisted of three compartments. The evidence presented by defendant was that only the hydraulic oil compartment had been attended to and that only the hydraulic oil compartment of the engine had been removed. The water compartment of the radiator was never removed. The evidence further was that a defective hydraulic oil compartment would not have affected the operation of the machine.

[126] Bartsch concluded, after perusing the service reports, to the effect that, prior to delivery, some modification was done on the machine radiator on 18 March 2011 and, at only 33.4 hours, the machine had repair work done to its water heat gauge, heat sensor, and vibration HR meter, and that the fact that repair work was carried out is

'eloquent' proof that, long before the machine was delivered to plaintiff, it experienced a serious problem of overheating occasioned by latent defects. According to his witness statement, Bartsch discovered faults during the performance of the 250 hours service namely, a hydraulic pipe leak and a hydraulic cooler leak. According to him, these faults were *manifestations* of a latent defect in the machine.

[127] During his evidence-in-chief, Bartsch testified that, if there was a leak in the hydraulic pipe, one would still be able to operate the machine, but the problem is that, if the oil spills onto the water compartment of the radiator, dust would accumulate on the water compartment which in turn would cause blockage of the radiator, which in turn would result in overheating if the radiator is not cleaned. Adams, the witness for the defendant refuted this view. Adams testified that, an oil leak on the hydraulic side of the radiator cannot spread to the water cooler since it would be blown to the back of the machine. Burger confirmed this, and testified that, because of the electric fan, the oil cannot get to the water compartment of the radiator. The view of Bartsch in this regard was not put to the witnesses of the defendant.

[128] Bartsch agreed with the view of Adams where Adams found that a large amount of dust had accumulated on the outside of the radiator, that it blocked the opening in-between the fins and that this was the cause of the overheating of the engine. His agreement with Adams on this point contradicts his opinion that the overheating was caused by latent defects. Bartsch conceded that, if the hydraulic leak is on the flange, on the side of the radiator, it would 'be more difficult' for the oil to spread into the radiator, but added: 'it is possible'.

[129] In cross-examination, Bartsch was confronted with the opinion of Bouwer, the expert for the defendant, and agreed with everything in the statement of Bouwer, except that he would not agree that dust had entered the engine. Bartsch conceded, however, that he could not argue where Bouwer stated that, upon opening the engine, he found excessive dust inside. Bartsch also disagreed that dust could have entered the engine through a dirty air filter, unless the air filter itself was damaged.

[130] In *Otjozondu Mining (Pty) Ltd v Purity Manganese (Pty) Ltd*,²⁰ it was emphasised that it 'is an elementary rule for the production of opinion evidence that a basis is laid for it and the methodology used and processes undertaken in reaching it laid bare'.

[131] Bartsch could not dispute the testimony of Bouwer, that excessive dust was found inside the engine. Bartsch could not explain the dust found inside the engine, except to state it could have entered if the air filter was damaged. There is, however, no evidence presented that the air filter was damaged.

[132] The hydraulic oil leak was attended to on 13 December 2011 by Nghuulikwa. Afterwards, the machine was operated for over an hour. Nghuulikwa testified that the 'problem was solved'. Nghuulikwa never saw an oil leak again.

²⁰ 2011 (1) NR 298 (HC) at para 65.

[133] Bartsch could not say that the work done on the machine prior to the sale, was done purposely because the machine had been overheating. Bartsch was also unable to say why the engine had ceased. Bartsch did not know what the problem with the engine was since he did inspect the engine and did not overhaul the engine. Bartsch testified that he had no knowledge regarding the extent of the damage to the engine.

[134] Bartsch, in my view, could not lay a basis for his opinion that the overheating was caused by latent defects in the machine. These latent defects were never identified. His expert opinion in respect of a latent defect is further contradicted by his consensus (with Adams) that a blocked radiator (which is not a latent defect) was the cause of the overheating. In my view, the opinion of Bartsch, to the effect that the overheating of the engine was as a result of latent defects, cannot be relied upon.

[135] The plaintiff, in its amended particulars of claim as well as in the witness statement of Nepolo, stated that the engine overheated continually and persistently. However in its particulars of claim and in the witness statement, mention is made of only one occasion when this complaint of overheating was reported to the defendant, on 13 September 2011. Burger, however, testified that he received a complaint of overheating on 25 October 2011. The corresponding job card opened reflected the complaint as overheating. Burger did not testify about any other occasion on which he had received a complaint of overheating and no other job card reflected a complaint of overheating. No such other complaint of overheating was put to Burger in cross-examination.

[136] It was submitted by Mr Barnard, who appeared for the defendant, that it is wholly unlikely where the overheating was allegedly such a persistent and serious problem, that there was only the one recorded complaint of overheating. The plaintiff testified that the overheating was so bad that he could only operate the machine for 3 hours and then let it cool down for 3 hours. In view of the fact that the plaintiff testified that he was on site 90 percent of the time, the plaintiff was asked during cross-examination the actual hours the machine would have been operated on a typical working day. The plaintiff was unable to do so.

[137] During cross-examination, the plaintiff was confronted with a calculation made by the legal practitioner of record for the defendant which showed that the machine worked for 8.22 hours per day if operated for five days per week.²¹ The plaintiff responded that he himself did not make the calculation and was not able to comment. The plaintiff and his counsel were given a copy of the calculation to study and to respond the next day, which they have not done. Counsel for the plaintiff pertinently elected not to deal with the calculation of the operating hours in re-examination.

[138] It was submitted by Mr Barnard, and testified by Burger, that there could have been no problem with a machine which worked 8.22 hours per day. It was further submitted that, in the light thereof that the machine was operated on average 8.22 hours per day, plaintiff's testimony that they could operate the machine only for 3 hours and then had it cool down for 3 hours cannot be the truth. I agree.

²¹ The calculation was done for the period 12 September 2011 until 15 January 2012.

[139] The plaintiff, in his witness statement, stated that, after the reconditioned engine had been refitted on 23 May 2012, 'the problem of overheating remained'.²² However, when a service request was made by the plaintiff on 20 July 2012 for a 1000 hour service,²³ the alleged problem of overheating was not mentioned at all.²⁴ After the refitting of the reconditioned engine, Nghuulikwa operated the machine for 3.6 hours and found everything to be in order. This evidence was not contradicted by plaintiff. According to the pleadings, the machine had worked up to 1500 hours by November 2012.

[140] The evidence of Adams and Nghuulikwa regarding the poor state of the machine was not contradicted. Nghuulikwa had found the heat gauge to be in the red and the air filter dirty. The operators of the machine were not called to refute their testimonies.

[141] Mr Rukoro's submission that, because none of the operators were called to confirm the daily cleaning of the air filter, it was not proven that no maintenance was done, misses the point. The onus was on the plaintiff to prove that the daily maintenance was done. These two operators could easily have testified on the daily routine maintenance they performed and that the radiator and air filter was kept clean.

²² The reconditioned engine was refitted at 781 hours.

²³ Plaintiff requested specific further issues to be attended to besides the 1000 hour service but is silent on any overheating.

²⁴ Plaintiff indicated that the hours stood at 1041 hours – 260 hours after the reconditioned engine had been fitted.

[142] In *Beukes v Mutual & Federal Insurance Co. Ltd*,²⁵ the High Court referred with approval to the case of *Galante v Dickinson*,²⁶ where Schreiner JA stated the following in respect of a failure by a party to call a witness:

'It is not advisable to seek to lay down any general rule as to the effect that may properly be given to the failure of a party to give evidence on matters that are unquestionably within his knowledge. But it seems fair at all events to say that in an accident case where the defendant was himself the driver of the vehicle the driving of which the plaintiff alleges was negligent and caused the accident, the court is entitled, in the absence of evidence from the defendant, to select out of two alternative explanations of the cause of the accident which are more or less equally open on the evidence, that one which favours the plaintiff as opposed to the defendant.'

[143] In a subsequent case of *Titus v Shield Insurance Co. Ltd*,²⁷ Miller JA stated the position as follows:

'It is clearly not an invariable rule that an adverse inference be drawn; in the final result the decision must depend in a large measure upon 'the particular circumstances of the litigation' in which the question arises. And one of the circumstances that must be taken into account and given due weight, is the strength or weakness of the case which faces the party who refrains from calling the witness. It would ordinarily be unsafe to draw an adverse inference against a defendant when the evidence of the plaintiff, at the close of the latter's case, was so vague and ineffectual that the Court could only by a process of speculation or very dubious inferential reasoning, attempt to find the facts.'

[144] In the present instance, the overheating of the engine was a material dispute. The case for the defendant was that all along (as was) evidence presented on behalf

²⁵ 1990 NR 105 HC at 110-111.

²⁶ 1950 (2) SA 460 (A) at 465.

²⁷ 1980 (3) SA 119 (A) on 133 E-G.

of the defendant, that the cause of the overheating of the engine was a blocked/dirty radiator and a dirty air filter which allowed dust to enter into the engine. The plaintiff could easily have refuted this evidence by calling the two operators of the machine. The failure by the plaintiff to do so would entitle the court to infer that this was done because the operators would not have supported plaintiff's case. This failure strengthens the case of the defendant in respect of the cause of the overheating of the engine, namely the misuse thereof.

[145] The court *a quo* found that the installation of a new turbo did not solve the problem of overheating. The installation of a new turbo, however, had nothing to do with overheating of the engine. It was installed in an attempt to address excessive smoking. There was thus no factual basis in evidence for this finding by the court *a quo*.

[146] The court *a quo* also found that the machine was beset with 'continual and persistent mechanical problems' as a result of the latent defect. There were only two problems with the machine. First, there was one recorded report of overheating. This was solved by a cleaning of the machine and the fitting of an extra electrical fan to the radiator. Secondly, there was a leak to the hydraulic oil side of the radiator of the machine. A number of attempts were made to rectify this, but only upon the flange being modified in accordance with a bulletin by the manufacturer was this problem solved. This was not a material problem as it did not affect the operation of the machine. The finding of the court *a quo* was not borne out by the evidence presented.

[147] The onus was on the plaintiff to prove its claims on a preponderance of probabilities. The court *a quo* stated that it did not have any good reason to reject evidence on behalf of the plaintiff that the loader had a latent defect. The court *a quo* came to this conclusion without making any credibility findings of the various factual witnesses as it should have. Nor did the court *a quo* make a finding in respect of the reliability of these witnesses. The court *a quo* also failed to consider the probabilities. The court *a quo* never embarked upon an exercise to test the plaintiff's allegations against the general probabilities, nor did the court *a quo* test the defendant's allegations against the general probabilities in order to determine if the balance of probabilities favour the plaintiff's case more than they do the defendant's.

[148] The court *a quo*, for example, did not refer to the testimony presented on behalf of the defendant that the machine had been operated by the operators employed by the plaintiff, whilst the heat gauge was in the red. The court *a quo* also did not refer to the evidence that the cause of the overheating of the engine was the failure to clean the radiator and air filter on a daily basis. This evidence was uncontested. The court *a quo* also did not refer to the uncontested evidence of Bower (an expert witness): that the cause of the overheating of the engine was caused by the amount of dust found inside the engine and that there was no evidence that dust could have entered the engine except through its air intake. The court *a quo* also did not refer to the expert evidence of Bower, that a leak to the hydraulic system of the engine, even on the radiator, could not have caused, or contributed to, the overheating of the engine or the damage he found.

[149] The court *a quo* also did not refer to Bouwer's testimony, that the damage and wear found by himself could have been caused by operating the engine at excessive temperatures, by dust penetrating the engine, by not performing services²⁸ at the required intervals and by a combination thereof. The court *a quo* also did not refer to the undisputed evidence of Bouwer; that, upon opening the engine, he found no 'latent' defect.

[150] The court *a quo* could only have accepted the evidence on behalf of the plaintiff if it had rejected the evidence on behalf of the defendant. The court *a quo* never rejected the evidence presented on behalf of the defendant.

[151] The court *a quo* did not consider the calculation, which was also not disputed, that the machine on average had been operated for 8.22 hours per day. This is in contrast with the allegation by the plaintiff that the machine was operated daily for 3 hours and left to cool down for 3 hours on instructions of the defendant (which allegation was denied).

[152] In my view, the probabilities on the uncontested evidence presented on behalf of the defendant favour the version of the defendant. At best for the plaintiff, if the contention that there were two mutually destructive versions before the court *a quo* is to be accepted for the sake of argument, then plaintiff has failed to discharge its onus of proving its case on a preponderance of probabilities.

²⁸ The warranty, in terms of Annexure C, was subject to the plaintiff adhering to the standard operating procedures and maintenance schedules as set out by the manufacturer.

[153] If the court *a quo* had evaluated and compared the evidence presented by the respective parties, the plaintiff's version could not have been preferred above that of the defendant. The court *a quo* should have dismissed the claims by the plaintiff.

[154] As pointed out (*supra*), the court *a quo* misdirected itself on a number of occasions which would justify this court to interfere with the orders made by the court *a quo*.

[155] The finding by the court *a quo* that Burger made a false misrepresentation to the plaintiff, that the machine was of high quality, durable and suitable for the purpose it was purchased for, was not proved. Neither was it proved, as found by the court *a quo*, that the machine was not 'merchantable'.

[156] The alleged assurances and guarantees had been given orally, according to Nepolo, by Burger. The only written warranty appears in Annexures B and C and is to the effect that the standard warranty period is 12 months or 2000 hours, whichever occurs first. Annexure A (para 16) excludes all oral assurances and guarantees, unless reduced to writing and signed by the parties. Therefore, the alleged assurances and guarantees orally given by Burger are excluded from the contract.

[157] It is not disputed that the defendant publicly held itself out to be an expert seller of machinery, equipment, spares and related products of the type of machine

sold to the plaintiff. In *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration*,²⁹ Corbett AJA explained what is meant by an 'implied term' as follows:

'In the first place, it is used to describe an unexpressed provision of the contract which the law imports therein, generally as a matter of course, without reference to the actual intention of the parties. The intention of the parties is not totally ignored. Such a term is not normally implied if it is in conflict with the express provisions of the contract. On the other hand, it does not originate in the contractual *consensus*: it is imposed by the law from without. Indeed, terms are often implied by law in cases where it is by no means clear that the parties would have agreed to incorporate them in their contract. Ready examples of such terms implied by law are to be found in the law of sale, eg the seller's implied guarantees or warranty against defects; . . .'³⁰

[158] The defendant's liability for latent defects is thus imposed by law. In the present instance, however, it does not assist the plaintiff in discharging its onus simply because no latent defect was proved on a preponderance of probabilities, or at all.

[159] The alleged breaches of the agreement were not proved by the plaintiff on a preponderance of probabilities. The plaintiff was, in my view, not entitled to cancel the contract.

[160] The plaintiff alleged that, as a direct result of defendant's breach of contract, it suffered certain damages. The claim for damages, as embodied in claim 2, is premised on the allegations in support of the first claim. Thus, where the plaintiff did

²⁹ 1974 (3) SA 506 (A) at 531D-F.

³⁰ See also *Consol Ltd t/a Consol Gloss v Twee Jonge Gezellen (Pty) Ltd & another* 2005 (6) SA 1 SCA at 21A-D.

not prove the allegations to sustain the first claim (breach of contract), there is no causal link to the damages claim.

Nevertheless, even if breach of contract is assumed, the written agreement between the parties (Annexure C, part F) provides as follows:

‘Notwithstanding any provision to the contrary the seller shall not be responsible for loss of contracts or profits, indirect, special or consequential damages of any nature.’

In my view, the court *a quo* should have dismissed plaintiff’s two claims.

[161] In the result the following orders are made:

- (a) The appeal succeeds;
- (b) The orders of the court *a quo*, including the cost order, are set aside;
- (c) The claims of the respondent are dismissed with costs; and
- (d) The respondent is ordered to pay the costs of this appeal, such costs to include the costs of one instructing and one instructed counsel.

MAINGA JA

FRANK AJA

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