



NOT REPORTABLE

CASE NO: SA 39/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

**NAMI PREFABRICATED HOUSING CLOSE
CORPORATION**

Appellant

and

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

Respondent

Coram: SMUTS JA, FRANK AJA and UEITELE AJA

Heard: 29 March 2021

Delivered: 13 April 2021

Summary: This appeal emanates from an action in the court *a quo* in which the appellant brought a claim against the respondent for the return of a truck belonging to it, plus an amount of N\$394 128,98 representing the costs to repair the truck, alternatively N\$235 862,55 an amount paid by the appellant to the respondent in respect of repairs to the truck, plus interest on the amounts. The respondent counterclaimed an amount of N\$15 158,32 for services rendered. The appellant contended that the respondent was responsible for the repairs in terms of a warranty given to it by the respondent. The respondent contended that the breakdown was caused by the introduction of sand and silicone to the engine and this cause was not

covered by the warranty. The respondent's plea amounted to a confession and avoidance as it admitted the warranty and that the engine breakdown took place during the currency of the warranty and within its parameters but avoided the consequences by alleging that the damages to the engine was caused by sand and silicone in the engine and hence that the respondent was not liable to repair the engine by virtue of the warranty. The court *a quo* found in favour of the respondent and dismissed the appellant's claim.

This court must determine whether the respondent discharged the onus upon it for asserting special facts excluding its liability under the warranty.

Held that, where a party 'admits the facts alleged in the claim but seeks to avoid the legal consequences by setting up other facts which, if established, will have the effect of such avoidance' then such plea is not a denial but one of confession and avoidance and in line with the general rule, he who asserts must prove what is asserted and the respondent was thus burdened with the onus to prove that the cause of the engine failure was sand and silicone.

Held that, appellant's averments that the engine failure fell within the terms and currency of the warranty is accepted.

Held that, the respondent failed to establish why the warranty did not cover the engine breakdown. Consequently, respondent's counterclaim stands to be dismissed.

Appellant applied for condonation and reinstatement of the appeal for the late filing of the record of appeal (the appellant applied from the bar for condonation and reinstatement for the late filing of the notice of appeal). This court found that although the actions of appellant's legal practitioner were not above criticism, the non-compliance was not of such a nature so as to not consider the prospects of success of the appeal.

Held, the requirement of prospects of success had been met and hence condonation for the late filing of the notice of appeal and the record is condoned and the appeal is reinstated.

The appeal succeeds.

APPEAL JUDGMENT

FRANK AJA (SMUTS JA and UEITELE AJA concurring):

Introduction

[1] Appellant instituted an action in the High Court against the respondent for the return of a truck belonging to it plus an amount of N\$394 128,98 representing the costs to repair the truck, alternatively N\$235 862,55 being an amount paid by appellant to the respondent in respect of repairs to the truck. Interest was also sought on the amounts claimed.

[2] The bone of contention between the parties is which party was responsible for the breakdown in the engine of the truck subsequent to repairs to the tune of N\$235 862,55 being done to it. The appellant contended that the respondent was responsible for its charges as the breakdown occurred within the terms of a warranty given to it by the respondent in respect of the repairs done by the latter. The respondent contended that the breakdown was caused by the introduction of sand and silicone to the engine and this cause was not covered by the warranty.

[3] The court *a quo* favoured the contention of the respondent and dismissed appellant's claim.

[4] The respondent's counterclaim of N\$15 158,32 for services rendered subsequent to the breakdown was granted. This claim involved the tow-in costs from where the truck broke down, the costs to disassemble the engine to determine the cause of the breakdown and the installation of a new starter.

[5] The appellant appeals against the judgment *a quo* and in its grounds of appeal takes issue with the findings in respect of the claim in convention and the counterclaim.

Disputes at the trial

[6] In his opening address at the trial counsel for appellant informed the court that there were only two issues for determination, namely whether there was sand in the engine of the truck of the appellant which caused it to seize and whether the driver of the truck should have noticed that there was something wrong with the engine and ought to have stopped operating the truck earlier. Counsel for the respondent agreed that these were the only issues.

[7] Whereas there was evidence and cross-examination on whether the driver should have noticed that there was something wrong with the engine because of abnormal noises emanating from it, this line was not further pursued in argument, and correctly so, and can be disregarded for the purposes of this appeal.

[8] The question as to sand (and silicone) being the cause for the engine breakdown arose in the following context.

[9] The respondent admitted that it had to effect the repairs to the engine in a 'workmanlike manner and with the necessary degree of skill and diligence' and reinforced this admission with a written warranty that reads as follows:

'We hereby confirm that the warranty for engine repairs would be one year/20 000 km, whichever comes first.

Please ensure that the truck have its 10 000 km service intervals done in this period.'

[10] It is common cause, as admitted to by the respondent, that the truck broke down within the period stipulated in the warranty and before the first 10 000 km service was due.

[11] The respondent's plea that the engine breakdown was covered by the warranty amounted to a confession and avoidance as it admitted the warranty and that the engine breakdown took place during the currency of the warranty and within its parameters but avoided the consequences by alleging that the damage to the engine was caused by sand and silicone in the engine and hence that the respondent was not liable to repair the engine by virtue of warranty.

[12] That the engine had broken down was also common cause and so is the fact that the respondent provided the appellant with a quotation of N\$394 128,98 to repair the broken down engine.

[13] I need to mention in passing that it is clear from the evidence that in the context of the trial the word 'silicone' was used to describe a mixture of oil and sand. It is clear that the references in the evidence to silicone in the engine was intended to indicate that the sand somehow entered into the engine, mixed with the oil and created what was termed 'silicone'.

[14] The main dispute at the trial thus revolved around the issue of the cause for the engine failure. In essence, whether the sand and silicone averment could be substantiated or whether the engine breakdown could be said to have been a result of bad workmanship.

The evidence

[15] Mr Gu Di testified that he represented the appellant when the original agreement to repair the truck was entered into with Ms de Klerk. As already indicated these repairs cost the appellant N\$234 862,33 and the repairs were covered by the warranty. He testified that subsequent to the repairs the truck was returned to the appellant. This was about 24 September 2014. On 19 January 2015 the truck was returned to the respondent to attend to a water leak which respondent then, according to them, did. On 9 February 2015 the truck was again returned to the respondent to attend to an oil leak. Once again this was attended to by the respondent. These

repairs were not charged for. On 6 March 2015 the truck's engine seized and it is this incident that lies at the heart of the litigation between the parties.

[16] The sequence of events testified to by Mr Gu Di was not disputed in any meaningful manner and must be accepted. I however do not view the evidence of much importance. The water leak cannot really be linked to the breakdown of 6 March 2015. Whereas the question of lubrication is relevant to the cause of severe damage to the engine on 6 March 2015, there is no link between the severe damages or the breakdown to the oil leak on 9 February 2015. Nor did any of the expert witnesses attempt to make anything of the oil leak on 9 February 2015. The point is that the breakdown in respect of the engine that the respondent repaired was within the currency and ambit of the warranty and thus *prima facie* covered by the warranty. This is why respondent in its plea had to admit the terms of the warranty but put up the facts (sand and silicone in the engine), so as to avoid the effect of the warranty.

[17] The appellant called two persons as expert witnesses namely Messrs Bouwer and Smith. Mr Bouwer started off as an apprentice with the South African Railways as a Diesel Electric Technical Fitter and eventually qualified as an artisan in this field. He gained further experience in the field whilst working as senior artisan in the Diesel and Electrical workshop of the Iron and Steel Corporation (ISCOR), Tsumeb Corporation Ltd (TCL) and Plastic Packaging. In 2001 he started his own business in the mechanical and electrical automotive industry. At the time of his testimony he had 39 years of practical experience in petrol and diesel trucks and about 25 years' experience in automotive engineering.

[18] Mr Bouwer inspected the engine together with Mr Smith and they jointly prepared a report. Mr Smith has a history of a career in the police force from where he migrated into the insurance industry. His experience in the workings of motor engines is more in line with that of a very interested amateur than that of a professional although he no doubt gained experience in this regard in his work in the insurance field. His evidence is in any event in line with that of Mr Bouwer. As mentioned Mr Bouwer has an impressive curriculum vitae when it comes to practical experience and knowledge of diesel engines.

[19] According to Mr Bouwer (and Mr Smith) the engine breakdown can be described as follows: The main bearing seized. This caused the piston and conrod to seize. I should add that the process started at the main bearing no. 4 and conrod no. 4 and spread to the other bearings and conrods. As the bearings failed the crankshaft got stuck which caused conrod no. 4 to break as it hit the engine block which in turn caused a hole in the engine block.

[20] Mr Bouwer (and Smith) were of the view that the train of events that followed from the seizure of the main bearing no. 4 was caused through lubrication failure. They discounted that sand and silicone could have set this train of events in motion as the discolouring of the crankshaft and other parts caused by the excessive heat and the lack of scratches or scuff marks on the parts inspected. Although there were marks on parts, the extent, according to them, was not of the nature one would have expected from a grinding paste that would be formed when sand and oil are mixed. Their inference is that the reason for the lack of lubrication was the result of the

components not being 'properly fitted with the prescribed tensions and clearances' to ensure that the lubrication (oil) is properly distributed through the engine.

[21] Respondent also called two expert witnesses, Messrs Stegemann and du Plooy. Mr du Plooy conducts a business known Specialised Petroleum Services CC in Windhoek which is an agent of a South African business known as Wearcheck Africa (Pty) Ltd. Wearcheck Africa (Pty) Ltd specialises in the analysis of oil samples. By doing this, the different components found in the oil can be used to establish whether there is excessive wear on the machine or any signs of further problems such as bearing seizure. Thus if excessive silicone (dust contamination) is evident from such sample a bearing failure can be forecasted to be in the offing. Mr du Plooy has specialised training to interpret the results obtained from samples forwarded to Wearcheck Africa (Pty) Ltd for analysis. The problem in the present matter is that there was no evidence to establish the sample he received for analysis from respondent was, as a matter of fact, obtained from the engine which forms the subject matter of investigation in this dispute. He received an oil sample with a reference number from respondent but no evidence was produced that the sample originated from the relevant engine. In the result his evidence must be disregarded in total.

[22] Mr Stegemann is of the same ilk as Mr Bouwer. A qualified diesel mechanic who has worked as such from 1982 and thus also has about 32 years' experience in the field when he testified. It should be mentioned that from 2000 to 2009 he did not work as a diesel mechanic but was an inspector of the Automobile Association of Namibia which work also involved the inspection of numerous defective engines.

[23] Mr Stegemann inspected the engine of the truck and found it showed signs of 'silicone and metal particulates'. According to him the sand found its way into the oil and hence into the engine where it started to cause damage commencing with the main bearing being the first in line in the lubrication circuit. From the main bearing it infiltrated other parts of the engine which sets off the train of events as described by Mr Bouwer. His main conclusion is thus 'that sand was introduced into the engine and this was the main cause of the engine failure'. According to him the discolouration referred to by Mr Bouwer is also present when the lubrication route gets blocked as this also caused excessive heat. The less pronounced scuff marks or scratch marks not found deeper in the engine are also, according to him, of no moment as the amount of sand he found in the engine on his inspection would have a much bigger effect on the main bearing no. 4 than deeper in the engine. He also mentioned that there were scuff or scratch marks on other components compatible with his inference. He conceded that if the air pipe and the air filter were intact on inspection by Messrs Bouwer and Smith the sand had to be inserted by human intervention which is in line with his initial conclusion.

[24] It needs to be pointed out that Mr Stegemann inspected the engine during October 2015 after it had been separated from the truck and taken from the premises of the respondent to an engineering business for assessment. This was about seven months after the engine breakdown on 6 March 2015. The engine was lying in the open and covered with dust. The inspection by Messrs Bouwer and Smith took place around July 2017, about 29 months after the breakdown. The engine, by then, was back at the respondent's premises and from a dust perspective in a better state.

[25] The question that arises is which cause for the engine failure is to be accepted seeing the difference between the experts and hence whether it was a lubrication failure as a result of poor workmanship or the introduction of sand in the engine. The court *a quo* reasoned that the fact that Mr Stegemann's evidence as to the state of the engine when he found it (dusty and sand and silicone in the oil hollows of the internal compartments of the engine) was to be preferred to that of Messrs Bouwer and Smith who were not present when the repairs to the engine were done and hence that their reliance on poor workmanship could not be accepted as no factual basis was laid for their opinion.

[26] Whereas there is some weight to the criticism of Messrs Bouwer and Smith, it must be borne in mind that the basis of all the experts is the condition of the internal parts of the engine. Mr Stegemann who saw and inspected the engine much earlier than Messrs Bouwer and Smit however had the advantage that the external condition of the engine and the sand and the silicone he found in the engine was an added factor he could rely on to draw his inference as to the cause of the engine failure. Once the introduction of sand through the air pipe and air filter are excluded, as it must be in line with the evidence of Messrs Bouwer and Smith, the only inferences that can be drawn as to the cause of the engine breakdown are the two mentioned by the respective experts. Either the repairs were done in an unworkmanlike manner or sand was deliberately inserted into the engine.

[27] The experts called by appellant discounted the introduction of sand based on the colouring and the condition of the damaged part in the engine. This was contested by the expert on behalf of the respondent who maintained that the discolouration is caused by heat when the engine seizes and whether this seizing of the engine is caused by lack of lubrication or excess sand or silicone makes no difference to this fact. From the evidence, it is not possible to determine whether the discolouration in the present matter is for some reason distinctly the one or the other. The only other feature of note is the inference relating to the abrasive effect a grinding paste would have had on all the engine parts in the lubrication cycle. Again whereas all the experts were adamant that their respective opinions were the correct ones, the fact remains that irrespective of what opinion is accepted the scratching and scuffing of parts follow the lubrication cycle which starts with the main bearing no. 4 in this particular engine and spreads from there. That means that a substantial quantity of sand in the oil will cause the most damage in the main bearing and its metal and will have a cascading effect with lesser adverse marks on the parts later in the lubrication cycle. The damage to the internal parts of the engine, ie main bearings, pistons, conrods and crankshaft fits in with the version of the experts on both sides.

[28] The upshot of the discussion around the expert evidence is that I cannot make a finding that one view of what caused the engine failure is preferable over the other view. From what is stated above the probabilities are evenly balanced and it is not possible on the evidence on record to make a finding as to the cause of the engine failure. This means the onus will be decisive in this matter.

Onus

[29] Where a respondent 'admits the facts alleged in the claim but seeks to avoid the legal consequences by setting up other facts which, if established, will have the effect of such avoidance' then such a plea is obviously not a denial but one of confession and avoidance.¹

[30] In the present matter respondent admitted that the warranty given in respect of the repairs to the engine and that the truck broke down because of engine failure within the terms and currency of the warranty. If respondent did not put up any facts to explain why it was in such circumstances, not liable under the warranty, it would not have had any defence to the claim. In other words, it had to avoid the legal consequences of the warranty by setting out facts omitted from the summons to put a different complexion on the case so as to destroy the effect of the allegations it had admitted. This the respondent did by averring the insertion of sand and silicone into the engine.

[31] Once the respondent pleaded a confession and avoidance the onus was on it to prove the facts relevant to its defence. It, in essence, amounts to a special defence and respondent must thus be regarded as the claimant in respect of the facts it so put up and must satisfy the court that it was entitled to succeed. As it was the respondent who asserted the special facts excluding the liability, it was for the respondent to

¹ Herbstein and Van Winsen *The Civil Practice of the High Courts of South Africa* vol 1 p 591.

prove these facts in line with the general rule that he who asserts must prove what is asserted.²

[32] Counsel for both parties accepted that respondent had the onus to prove that sand and/or silicone was the cause of the engine failure in the present matter.

[33] It thus follows that the averments of the appellant (as plaintiff *a quo*), relating to the engine failure that fell within the terms and currency of the warranty had to be accepted as the excuse for why the warranty did not cover the engine breakdown, was not established by the respondent.

Consequences of failure to honour the warranty

[34] As evident from the facts the respondent refused to honour the warranty maintaining that the breakdown was caused by sand and/or silicone being introduced into the engine. In fact it gave the appellant a quotation of N\$394 128,98 to repair the engine.

[35] As a result of the respondent's refusal to honour the warranty and repair the engine at its costs, the appellant cancelled the agreement and sought return of the truck as well as damages equal to the quotation to repair the truck, alternatively repayment of what it had paid for the initial repairs.

[36] The initial amount to effect the repairs to the engine in respect of which the warranty was issued amounted to N\$235 862,55. The quotation to repair the engine

² *Pillay v Krishna & another* 1946 AD 946 at 952-953 and *Trethewey & another v Government of the Republic of Namibia* (SA 13/2006) [2016] NASC (29 November 2016) para 30.

subsequent to the breakdown relevant to this appeal amounted to N\$394 128,98. Counsel for appellant submits that the appellant is entitled to the latter amount.

[37] Whereas the return of the truck together with the amount paid to respondent in terms of the initial repairs would involve restitution as a result of the cancellation of the initial contract, the payment of the larger amount would represent appellant's damages as a result of the breach of the warranty by respondent. In other words, what would the reasonable costs be to repair the truck?³

[38] To simply present the quotation of respondent and to infer from it that the amount indicated thereon would be the reasonable repair costs is in my view not correct. Whereas a quotation may represent the reasonable repair costs this is not necessarily so. It is common knowledge that, especially where the amount involved is high, negotiations following upon quotations may indeed lead to lower repair costs. It is also common knowledge that where more than one quotation from different suppliers are obtained they may differ significantly from one another.

[39] The reasonableness of the quotation was not canvassed at all with Ms de Klerk in evidence. She was the senior service manager of the Hino Trucks division of respondent and the person who at the time issued the written warranty. She might have confirmed the reasonableness of the quotation or she would have indicated that it was still subject to negotiation. She might even have testified as to what a reasonable price to repair would have been even if it was stated to be within certain

³ *Maennel v Garage Continental Ltd* 1910 AD 137.

parameters. This issue was not canvassed with her at all and in my view the amount of N\$394 128,98 as the reasonable damages was not established and only a full restitution is justified.

Claim in reconvention

[40] The claim in reconvention was premised on the breakdown of the truck not being covered by the warranty and the respondent hence sought to be recompensed for the costs involved in the tow-in of the truck, disassembling of the engine for inspection and the installation of a new starter.

[41] As I have found that the breakdown of the engine (truck) was covered by the warranty the costs claimed had to be borne by the respondent and it thus cannot claim it from the appellant.

[42] It follows that the claim in reconvention stands to be dismissed.

Condonation application

[43] At the outset of the hearing of this matter the appellant sought condonation for the late filing of the record. Respondent opposed this application and pointed out that the notice of appeal was also filed late and that no condonation application was sought in respect of this non-compliance with the rules of the court.

[44] In the heads of argument counsel for appellant disputed the averment of the respondent that the notice of appeal was filed late. According to him, the time period for the filing of a notice of appeal only commences to run from the date the reasons

for a judgment or order is made available. Hence, where an order is given without reasons, as in this matter, a party can wait for the reasons and only thereafter file a notice of appeal which must then be filed within 14 days of the reasons being made available.

[45] Counsel for respondent pointed out that the interpretation submitted on behalf of the appellant was contrary to the reasoning of this court in a recent judgment⁴ where the position was stated as follows:

‘Where an order or judgment is made without reasons, the notice of appeal should nevertheless be filed within 21 days of such order and such notice should simply indicate that the grounds of appeal will follow once the reasons are forthcoming. An amended notice of appeal should then be filed containing the grounds of appeal within 14 days of receipt of such reasons.’

[46] I accept the explanation from counsel for the appellant that he was unaware of the judgment of this court in this respect as it is a recent judgment and may not have come to his knowledge when he prepared and filed his heads of argument. I trust that this court will not have to deal with this issue again as the position should now be clear and legal practitioners should be aware of it and manage their future conduct concerning appeals accordingly.

[47] The record was filed late. The cause thereof was essentially the failure of a secretary in the legal practitioner’s office who did not carry out instructions. When the legal practitioner followed up on the instructions given to the secretary about three weeks later it was discovered that the secretary had not executed her instructions.

⁴ *Fischer v Seelenbinder* (SA 2/2019) [2020] NASC (4 December 2020) para 17.

This failure was then corrected virtually immediately. A further delay may have been caused by the fact that no one was responsible for following up the matter when the secretary was on leave. This should not have happened as the legal practitioner by then already knew that the record would be filed late and she should have taken responsibility to follow this matter up with the transcribers immediately. It is not however clear that had she done this the record would have been produced earlier.

[48] Whereas the actions by the legal practitioner of the appellant are not above criticism, the non-compliance was not of such nature so as to not consider the prospects of success of the appeal and the parties were thus invited to address the court on this aspect which their respective legal practitioners did. From what is stated above it is clear that the prospects of success requirement had been met and hence condonation for the late filing of the notice of appeal and the record should be condoned and the appeal be reinstated.

Conclusion

[49] In the result, the respondent must return the appellant's truck to it together with the amount of N\$235 862,55 paid by the appellant in respect of the initial repairs to the truck.

[50] The order is thus as follows:

- (a) The appeal succeeds with costs, which costs shall include the costs of one instructing legal practitioner and one instructed legal practitioner.

- (b) The order of the court *a quo* is set aside and the following order is substituted for that order:
- ‘(i) The cancellation of the agreement between the parties relating to the repair of appellant’s truck is confirmed.
 - (ii) The respondent is ordered to return the appellant’s truck, a Toyota Hino 500 truck with the registration number N 18751 W to appellant within seven days of this order.
 - (iii) The respondent is ordered to pay the appellant an amount of N\$235 862,55 together with interest thereon *a tempore morae* at the rate of 20% from the date the summons was served on respondent up to date of payment.
 - (iv) The respondent is to pay the costs of suit inclusive of the costs of one instructing legal practitioner and one instructed legal practitioner.
 - (v) The claim in reconvention is dismissed with costs inclusive of the costs of one instructing legal practitioner and one instructed legal practitioner.’

FRANK AJA

SMUTS JA

UEITELE AJA

APPEARANCES

APPELLANT:

G Narib

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RESPONDENT:

J Diedericks

Instructed by Viljoen & Associates,
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