REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

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

In the matter between:

MCDONALD TENDAI NYAMAYARO **PLAINTIFF**

and

PZN PANELBEATERS CC **DEFENDANT**

Neutral Citation: *Nyamayaro v PZN Panelbeaters CC* (HC-MD-CIV-ACT-OTH-2019/00268) [2020] NAHCMD 318 (2 July 2021)

CORAM: PRINSLOO J

Heard: **7-10 September 2020; 28 September 2020, 4 November 2020, 21 January 2021 and 8 -9 June and 12 June 2021**

Delivered: **2 July 2021**

Flynote: Civil Practice – Damages – Plaintiff instituting claim against defendant for damages – Defendant instituting a counterclaim for storage fees – Court held he who alleges must prove their case on a balance of probabilities – Court held both plaintiff and defendant failed to prove their claims on a balance of probabilities – Court dismissing both with costs.

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

The defendant plead that the vehicle was repaired to the full satisfaction of the plaintiff as confirmed by the plaintiff's assessor and insurer and the amount of N$ 97 175.99 was duly paid by the plaintiff's insurer. The defendant plead that the vehicle was repaired as per instructions and was presented to the plaintiff on 7 September 2018, however the vehicle suffered unrelated damages to the sealed computer box (ECU), which was as a result of no fault of the defendant but as a result of normal wear and tear due to high mileage of the vehicle and the Namibian weather conditions.

Held that the defendant had a general duty to prevent loss or damage to the plaintiff's vehicle entrusted to it to repair but this duty of care has limits and if it so far removed

from anything that the defendant could foresee the question must be asked if the defendant can be held liable.

Held further that that there is no a causal link between the work done on the plaintiff's vehicle by the defendant's employees and the short in the ECU and can therefore not find that defendant breached the general duty of care it had in respect of the plaintiff's vehicle. As a result claim one cannot succeed.

Held accordingly that it is clear from the evidence that the ECU was not damaged as a result of the sandblasting repairs.

Held that in the absence of agreement on the storage costs there can be no contract between the plaintiff and the defendant, the defendant would not be entitled to the claim for storage costs.

ORDER

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1. The plaintiff's claims are dismissed with costs.
2. The defendant's counterclaim is dismissed with costs.
3. The matter is removed from the roll and regarded as finalised.

JUDGMENT

Introduction:

[1] From the onset it is important to note that at the close of the plaintiff's case the defendant brought an application for absolution from the instance[1]. I dismissed the

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

application as I was of the view that a court, applying its 'mind reasonably' to such evidence, could or might find for the plaintiff.

[2] I was further of the view that the defendant has a case to answer to with the rider that once I had the opportunity of hearing all the relevant evidence in the matter, I might reach a different conclusion.

The parties

[3] The plaintiff is MacDonald Nyamayaro, a financial adviser by profession, residing in Windhoek. The defendant is PZN Panelbeaters CC, a close corporation, duly incorporated in terms of the relevant laws of Namibia, situated in the Northern Industrial Area, Windhoek.

The pleadings

[4] The plaintiff, being the owner of a Kia Sportage motor vehicle, presented his vehicle for sandblasting repairs to the defendant on the basis of an approved quotation from his insurer, Mutual and Federal.

[5] The defendant quoted N$ 102 237.89 for the repair works and the quotation was accepted. As a result the plaintiff's vehicle was delivered to the defendant for repairs during August 2018.

[6] The plaintiff pleads that the parties entered into a partly written, partly oral agreement for the repairs of the vehicle. The plaintiff pleads that the tacit and/or express and/or implied terms of the oral agreement were that:

a) The agreed price for the repairs shall be N$ 97 125.99, and
b) The plaintiff will deliver the motor vehicle to the defendant on or before 21 August 2018;

c) The defendant would repair the plaintiff's motor vehicle for sandblasting damage;
d) The vehicle would be repaired within a reasonable time;
e) The plaintiff's insurer will pay for the repairs in the amount of N$ 97 125.99 upon completion of the repairs.

[7] The plaintiff further pleads that the defendant failed to comply with the material terms of the agreement in that:

a) The defendant failed to repair the vehicle for sand blasting problems as agreed upon;
b) The defendant failed to complete the repairs of the vehicle within a reasonable time.
c) The defendant failed to take reasonable steps in repairing the vehicle with the necessary care and diligence and as a result the motor vehicle's starter stopped working;
d) The defendant was negligent and/or failed to take reasonable care during the repair of the vehicle due to sand blasting and as a result, the vehicle's computer box was burned and/or damaged.

[8] In respect of claim one the plaintiff pleads that as a result of the negligence of the defendant the plaintiff suffered damages in the amount of N$ 41 783.64 in respect of the replacement value of the vehicle's computer box that was damaged.

[9] In respect of claim two the plaintiff pleads that due to the failure of the defendant to repair the vehicle within a reasonable time he had to lease a vehicle from one Mr Gabriel Shilume for a daily rental amount of N$ 550 amounting to a total of N$ 79 200.

[10] In support of claim two the plaintiff annexed a lease agreement he entered into with Mr Shilume for the rental of a BMW 2004 motor vehicle, registration number SHL904H from 24 September 2018 for a period of a month subject to renewal by mutual agreement between the parties. The plaintiff claimed the amount of N$ 550 per day

from September 2018 to date of judgment, however the plaintiff settled on calculating the amount from 24 September 2018 to 14 February 2019.

[11] As a result the plaintiff claims the following amounts from the defendant:

a) Payment in the amount of N$ 41 783.64;

b) Payment in the amount of N$ 79 200.00;

c) Interest and costs.

[12] There was however a partial settlement agreement reached between the parties on 15 May 2019 in respect of the plaintiff's first claim and the claim amount in this regard was accordingly reduced to N$ 12 099.50.

[13] The defendant pleads that the plaintiff's vehicle was assessed for damage caused by sandblasting only and not for any electrical work done. The defendant further pleads that the agreed price for repairs was N$ 102 237.89 of which the insurer was due to pay N$ 97 175.99 and the balance was payable by the plaintiff as the excess payment.

[14] The defendant further pleads that the vehicle was repaired to the full satisfaction of the plaintiff as confirmed by the plaintiff's assessor and insurer and the amount of N$ 97 175.99 was duly paid by the plaintiff's insurer. The defendant pleads that the vehicle was repaired as per instructions and was presented to the plaintiff on 7 September 2018, however the vehicle suffered unrelated damages to the sealed computer box (ECU), which was as a result of no fault of the defendant but as a result of normal wear and tear due to high mileage of the vehicle and the Namibian weather conditions.

[15] The defendant further pleads that the vehicle was sent to an independent and duly appointed agent of KIA Motors Namibia, to wit Associated Motor Holdings Namibia (AMH), for an assessment and AMH found that the ECU had an internal short due to high mileage of the vehicle and it was no longer covered under the warranty of the vehicle.

[16] As a result of a verbal instruction by the plaintiff the defendant had the ECU replaced after ordering it from and collected it in South Africa. The defendant tendered collection of the vehicle to the plaintiff on 14 February 2019 against payment of the ECU replacement and repair costs of N$ 12 099.50 and the excess payment for the sandblasting repairs in the amount of N$ 5 3131.55. The defendant pleads that claim one was fully settled during mediation when the parties reached a partial settlement in respect of the aforementioned amounts.

[17] In respect of the second claim the defendant pleads that the rental of N$ 550 per day for a 2004 model BMW is not fair and reasonable.

[18] The defendant also filed a counterclaim in respect of storage fees calculated from 14 February 2019 when the defendant offered the vehicle to the plaintiff until 15 May 2019, when the matter was partially settled. The storage fees were calculated at a rate of N$ 207 (VAT inclusive) per day for the said period and amounted to N$ 18 630. The defendant claims for the said amount plus interest and cost of suit.

[19] The plaintiff denies any liability towards the defendant in respect of the storage fees.

The pre-trial order

[20] In terms of the pre-trial order the court has to adjudicate the following issues of facts and law:

a) 'Issues of fact to be resolved during the trial:
    1. Whether the plaintiff's computer box was damaged as a result of the Defendant's negligence in repairing the Plaintiff's motor vehicle in the following manner:
        i. Defendant's failure to repair the motor vehicle for sand blasting problems as agreed upon;
        ii. Defendant's failure to take reasonable steps in repairing the motor vehicle with the necessary care and diligence.

2. Whether the damage of the Plaintiff's computer box was solely because of the negligence of the Defendant in repairing the Plaintiff's motor vehicle.
3. Whether the agreed price for the repairs of the Plaintiff's motor vehicle was N$ 97 125.99.
4. Whether the Plaintiff suffered consequential damages by renting a car.
5. Whether the Plaintiff's damages for renting a car is fair and reasonable.

b) Issues of law to be resolved during the trial:

1. Whether the Defendant can be held liable for damages suffered by the Plaintiff as a result of the Defendant's negligence in repairing the Plaintiff's motor vehicle.
2. Whether the Plaintiff is entitled to payment by the Defendant for the daily motor vehicle rental in the amount of N$ 79 000.
3. Whether the Partial Settlement Agreement between the parties dated 15 May 2019 constitutes a final and full settlement of the Plaintiff's claim of N$ 41 783.64 which is the amount for the replacement value of the computer box, without such being reduced to writing as required in terms of the Partial Settlement Agreement.'

Facts not in dispute

[21] Having heard the evidence in this matter and having read the pleadings the following appears to be common cause between the parties:

a) The plaintiff's vehicle had sandblasting damage which had to be repaired and the total amount that was due to the defendant was N$ 102 237.89, which amount included the excess amount payable by the plaintiff in the amount of N$ 5 3131.55;
b) The plaintiff's vehicle was in a running condition when it was delivered to the defendant by Ms Kasetura on 21 August 2018.
c) The ECU also referred to as the computer box of the vehicle became defective during the period that the plaintiff's vehicle was in the care of defendant.
d) The ECU had an internal short but the parties are unable to agree as to the cause of the internal short.
e) The ECU is the engine control unit of the vehicle.

f) A partial agreement was reached between the parties on 15 May 2019 regarding the costs of the new ECU and the insurance excess payment.
g) The sandblasting damage was repaired by 7 September 218.
h) The insurer paid the amount of N$ 97 175.99 to the defendant upon completion of the repair work.
i) The plaintiff only collected his vehicle on 15 May 2019, upon payment of the cost of the ECU. The insurance excess payment was made on a later date.

Evidence adduced

i. On behalf of the plaintiff

[22] Three witnesses were called to testify on behalf the plaintiff, i.e:
a) MacDonald Nyamayaro;
b) Veronika Kasetura; and
c) Gabriel Shilume

MacDonald Nyamayaro
The evidence of the witnesses can be summarized as follows:

[23] The plaintiff testified his Kia Sportage, registration number N 161-948 W was handed to the defendant to effect repairs to his vehicle in respect of sandblasting damage sustained by his vehicle. The plaintiff is a financial advisor by profession that travels the length and breadth of the country during which travels the vehicle sustained sandblasting damage. As a result the plaintiff approached his insurer, Mutual and Federal to repair his vehicle.

[24] After the plaintiff obtained two quotations he requested that the defendant be appointed to do the repair work.

[25] After approximately a week the plaintiff approached the defendant's workshop to determine the progress of the work on the vehicle and to enquire if the work can be expedited as he needed his vehicle. The repair work was scheduled to take two weeks. The plaintiff was informed that the defendant required a further two days to complete the work on the vehicle but that all was on schedule and the vehicle would be done in time.

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

[27] The plaintiff testified that weeks passed thereafter and he did not receive his vehicle back. He then approached the insurance company to make enquiries from Mr Dippenaar, the member of the defendant CC. After a lot of correspondence between the plaintiff, the insurance company and the defendant, the plaintiff resorted to confronting Mr Dippenaar regarding the delay in receiving his vehicle back. When the plaintiff arrived at the office of Mr Dippenaar he was introduced to an elderly gentleman to whom the plaintiff referred as a 'TV repair man' and he and Mr Dippenaar were talking about mechanics, electronics and the vehicle's computer box. At the time the ECU was opened and lying on the table. Whilst sitting in the office Mr Dippenaar made a telephone call to the South African dealers in an attempt to find a person to repair the ECU as the quote for the replacement cost of the ECU was N$ 41 783.64.

[28] The plaintiff testified that all this took place without consulting him or obtaining his approval. The plaintiff further testified that he was upset because he delivered a vehicle in a good running condition to the defendant's workshop, yet during the meeting

with Mr Dippenaar it was implied that he had an old car and that the issues with the ECU were due to wear and tear and that the defendant cannot be blamed for the damage to the ECU.

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

[30] The plaintiff decided to seek legal advice and after the exchange of correspondence the plaintiff was informed via email by the defendant on 14 February 2019 that his vehicle was ready for collection. The email had two invoices attached thereto, namely an invoice in the amount of N$ 12 099.50 for the ECU (which was replaced) and one in the amount of N$ 5 313.55 for the insurance excess levy which was payable by the plaintiff. This appears to be the subject matter of a partial settlement agreement reached on 15 May 2020 as a result of mediation.

[31] In terms of the partial settlement agreement the plaintiff was entitled to all the old parts, which were replaced during the repair of the vehicle in respect of the sandblasting damage, but the plaintiff testified that he did not receive the damaged ECU. Upon enquiries from the defendant he was informed that the old ECU was thrown away and he was therefore unable to obtain a second opinion as to what caused the damage to the ECU.

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

[33] In respect of the second claim the plaintiff testified that as he only had the rental vehicle for a period of 30 days and needed a vehicle to be mobile he entered into an agreement with an ex-colleague, Mr Gabriel Shilume to rent a vehicle at a rate of N$ 550 per day which resulted in a claim of N$ 79 200 for the 9 month period that the plaintiff rented the vehicle, which was the period that the plaintiff's vehicle was in the care of the defendant.

[34] During cross-examination when questioned on the fact that the work done on the vehicle was limited to work that was cosmetic in nature the plaintiff disagreed and testified that the defendant had to remove the head lights of the vehicle which relates to auto-electrical work.

[35] The plaintiff disagreed with the statements of Mr Theron that the lights is a sealed unit that is fitted by plugging the unit in or out and was of the view that this had to be done by an expert and if there is no such expert in-house the defendant had to send the vehicle to the dealership to complete that portion of the work.

[36] The plaintiff was further of the view that the lights of the vehicle would not work if the ECU is damaged. When asked on what the plaintiff based his opinion the plaintiff

responded that he did research on the internet according to his research everything in the vehicle operated through the ECU, including the lights of the vehicle.

[37] When confronted with the age and the mileage of the vehicle the plaintiff denied that any of those factors played a role in the damage to the ECU.

[38] In respect of the second claim and the amount he paid for the rental of Mr Shilume's vehicle the plaintiff testified that the arrangement suited him as he no had money and could therefore not make use of a car rental company and with Mr Shilume he could reach a more flexible arrangement.

[39] The plaintiff testified that he made cash payments to Mr Shilume and could bring his bank statements to confirm the withdrawal of the funds but conceded that there are neither bank statements nor receipts before court to confirm the payments. The plaintiff testified that he initially did not care about the rental claim but on advice of his counsel the second claim was instituted.

Veronica Kasetura

[40] The second witness, Veronica Kasetura is the girlfriend of the plaintiff and she was requested by the plaintiff to deliver the vehicle to the premises of the defendant for repairs, which she did.

Gabriel Shilume

[41] The third witness, Gabriel Shilume testified that he is the owner of a BMW motor vehicle, 2004 model with registration number SHL904H, which he leased to the plaintiff for a number of months during the period of 2018 to 2019.

[42] During the course of his evidence Mr Shilume corrected his evidence by stating that the vehicle was a 2014 model and not a 2004 model.

[43] Mr Shilume testified that he and the plaintiff are friends and former colleagues and when he heard that the plaintiff was in need of a vehicle to rent he offered his vehicle to the plaintiff. Mr Shilume then proceeded to draft a lease agreement, which was signed by both parties on 24 September 2018.

[44] The terms of the lease agreement were that the plaintiff would pay Mr Shilume a daily rate of N$ 550 and that the amount would be payable on the 25th day of the month. The lease period was for one month, which could be extended by mutual agreement between the parties on a month to month basis.

[45] Mr Shilume testified that the agreement was indeed extended on a month to month basis until 14 February 2019 and during the relevant period the plaintiff paid him a monthly payment of N$ 17 050 in cash which amounted to N$ 79 200.

[46] Mr Shilume testified that the reason for the cash payment was because he was in a financial difficulty at the time and his bank account was in an overdraft and cash payment suited his circumstance better.

[47] During cross-examination Mr Theron confronted the witness with the year model of the vehicle and why the witness corrected it from a 2004 model to a 2014 model. Mr Shilume testified that the reference to a 2004 model in his witness statement must be a typing error. When he was further confronted with the fact that the lease agreement, drafted by the witness personally, also reflect the model as 2004 Mr Shilume testified that it was a human error.

[48] Mr Shilume was questioned as to the whereabouts of the registration papers of the vehicle to show the correct year of registration but the witness explained that the registration papers are at his home in the North. The documents were however not discovered either.

[49] In respect of the monthly payment of the rental amount Mr Shilume testified that the plaintiff made his payments diligently on the 25th of every month and in the event that he was late it was only by a day or so. The witness again confirmed that the payments were made in cash but that he never issued the plaintiff with a receipt as he did not expect the matter to turn in court.

[50] Mr Shilume testified that he recorded some of the payments in a dairy he has, where the plaintiff would sign as well but the diary was packed up with the rest of his stuff when he moved to the North in 2020 and this specific diary is packed away in a box, in a garage in Katutura and the lady who is in possession of the key is out of the country. The proof of payment was not made available to either the plaintiff or to counsel.

[51] When Mr Theron enquired why the proof of payment was not made available to counsel for purposes of the trial Mr Shilume responded that he did not think it was important.

[52] In conclusion, when Mr Theron put it to the witness that he never received any payment and that the agreement between him and the plaintiff was a simulated agreement Mr Shilume testified that he received cash but that he could not remember everything as he was of ill health and that he came to court to testify that he received the money.

[53] This concluded the plaintiff's case. As indicated earlier the defendant then brought an application for absolution from the instance that was refused.

ii. On behalf of the defendant

[54] Three witnesses were called to testify on behalf of the defendant, i.e.:

a) Willem Sterrenberg Dippenaar;
b) Tammo Piehl;

c) Bazill Van Rhyn.

Willem Sterrenberg Dippenaar

[55] Mr Dippenaar testified that he is the principal member of the defendant. The defendant operates as a panel beater and is registered as an approved service provider with all the major insurance companies in Namibia, including the insurer of the plaintiff.

[56] Mr Dippenaar testified that on 31 July 2018 the plaintiff brought his KIA Sportage motor vehicle for a quotation to repair sandblasting damage to the said vehicle. The defendant issued the plaintiff with a quotation for N$ 102 237.89 for the repair of the vehicle.

[57] After the assessor assessed the damage to the vehicle and considered the defendant's quotation the defendant received the order for repairs from the plaintiff's insurer and the repairs commenced on 21 August 2018.

[58] Mr Dippenaar testified that the required work was done on the body of the vehicle and the said work was completed on 7 September 2018. The vehicle was driven to the wash bay at the defendant's workshop to be washed before delivery to the client. After the vehicle was washed it was driven to an area where the headlights of the vehicle was adjusted manually and a final inspection was done. After all this was done the vehicle failed to start.

[59] Mr Dippenaar testified that he contacted the plaintiff regarding the non-starting issue of the vehicle but the plaintiff was less than receptive and unwilling to accept the explanation that no work was done in respect of the electrical systems of the vehicle. The plaintiff was adamant that his vehicle must be returned to him in a running condition.

[60] On the instructions of the witness the vehicle was taken to AMH, the official Namibian Kia agents to test the vehicle in order to determine what the issue is that caused the vehicle not to start. On 26 September 2018 Mr Dippenaar received a report from Mr Tammo Piehl indicating that the ECU had an internal short. The said report was provided to the plaintiff however the plaintiff insisted that the defendant repair the computer box.

[61] Mr Dippenaar testified that he then informed the plaintiff that he will arrange for the repair of the ECU but that it will be at the cost of the plaintiff. As he had a lot of contacts Mr Dippenaar managed to secure a new ECU with SIM Technology in Johannesburg, South Africa at a very reasonable price. Mr Dippenaar testified that he collected the ECU in Johannesburg in January 2019 after all the old data was transferred from the old device to the new one. The vehicle was taken to AMH to install and code the new ECU on 12 February 2019.

[62] On 14 February 2019 the plaintiff informed the plaintiff via e-mail that the vehicle was ready for collection. In the said email the plaintiff was informed that if the plaintiff did not collect the vehicle within 7 days then the defendant would charge storage fees in the amount of N$ 180 per day (excluding VAT). Mr Dippenaar further testified that the plaintiff was informed that the vehicle would only be released upon payment of the excess and the cost of the new ECU. The plaintiff however refused to pay either the excess fee or the replacement costs of the new ECU and as a result the defendant exercised a *lien* over the vehicle.

[63] Subsequently the vehicle was only collected by the plaintiff subsequent to a partial settlement agreement reached between the parties on 15 May 2019.

[64] Mr Dippenaar testified that the plaintiff's vehicle accumulated storage fees from 14 February 2019 to 15 May 2019 in the total amount of N$ 18 630 (Including VAT), which thus forms the basis for the counterclaim of the defendant.

[65] Regarding the plaintiff's complaint that the defendant failed to repair the vehicle for the sandblasting problems Mr Dippenaar testified that the vehicle was repaired to the full satisfaction of the plaintiff (who received the vehicle on 15 May 2019) and the assessor of the plaintiff's insurer as well as the plaintiff's insurer duly paid their portion of the fee, i.e. N$ 97 125.99.

[66] Mr Dippenaar also denied the plaintiff's allegation that the vehicle was not repaired within a reasonable time and testified that the vehicle was brought to the plaintiff on 21 August 2018 and the repairs were completed by 7 September 2018. Mr Dippenaar emphasized that the problem with the computer box was unrelated to the work done on the vehicle. There was in the witnesses view neither a delay in repairing the sandblasting damage, nor was there a delay in repairing the ECU on the plaintiff's instructions.

[67] Mr Dippenaar denied any negligence on the part of the defendant which would cause the short in the ECU. The witness explained that the headlights of the vehicle were replaced but that would entail the removal of the clips which holds the light in place and unplugging the light, which is like plugging in or unplugging any other device from an electric socket.

[68] During cross-examination Mr Dippenaar testified that the work done to the vehicle of the plaintiff is cosmetic in nature and that no work was performed on the electrical system of the vehicle. Mr Dippenaar denied the plaintiff's version that if the ECU is not operational that the lights would not work either.

[69] Mr Bangamwabo confronted the witness about the terms of the partial settlement agreement dated 15 May 2019, in terms of which the parties agreed the defendant would return all the old parts to the plaintiff but that the defendant failed to return the old ECU to the plaintiff and is therefore in breach of the settlement agreement. Mr Dippenaar testified that the old ECU had to be send to SIM Technology in order to transfer the old data to the new device and it was not returned to the

defendant. Mr Dippenaar added that the plaintiff never asked for the old ECU and the partial settlement agreement was entered into long after the vehicle was repaired. Mr Dippenaar also denied the plaintiff's allegations regarding "TV Repairman" that was attempting to repair the ECU and the witness further testified that he did everything he could to assist the plaintiff in order to resolve the issue regarding the defective ECU.

[70] Mr Bangamwabo further confronted the witness with the fact that the ECU was damaged whilst the vehicle was in the care of the defendant. Mr Dippenaar remained adamant that the vehicle's ECU was not damaged by the defendant's employees during any work done to the vehicle as no electrical work was performed on the vehicle.

[71] In respect of the counterclaim it was put to the witness that no invoice was issued confirming the counterclaim. Mr Dippenaar testified that the plaintiff was informed via e-mail on 7 February 2019 that the plaintiff will be liable for storage/standing fees if the vehicle is not collected within 7 days. Mr Dippenaar emphasized that the defendant is only claiming storage fees from February 2019 and not for the earlier period.

Tammo Piehl

[72] The second witness called on behalf of the defendant is Mr Tammo Piehl, who is employed as a Kia Master Technician and has 21 years' experience. Mr Piehl is employed with AMH in Windhoek, which is a recognized and official agent of Kia motor vehicles in Namibia.

[73] Mr Piehl testified that during September 2018 AMH received a 2014 model Kia Sportage 2WD with registration number N 161-948 W for inspection and a report on the cause of the vehicle's non-starting. Mr Piehl testified that he is well acquainted with the said vehicle as the plaintiff did all his services at AMH.

[74] Mr Piehl testified that there are two operating systems on a vehicle like the Kia Sportage, namely a) the BCM or body control model and b) the ECU or engine control unit. Mr Piehl testified that the headlights of a vehicle are part of the BCM and not controlled by the ECU. According to the witness the ECU controls everything that has to do with the engine of the vehicle whereas the BCM controls everything that has to do with the body of the vehicle. The witness described the ECU as a sealed electronic unit and testified that when the vehicle was brought in for checking it was put on a diagnostic instrument and the two devices failed to communicate with each other and because of this fact he made a finding that there was an internal short in the ECU.

[75] Mr Piehl testified that if the headlights of the vehicle are replaced it is controlled by the BCM and that the BCM and the ECU work through different circuits in the vehicle although they go through the same fuse box. Mr Piehl further testified that AMH has replaced many vehicles headlights and confirms that the light is fitted with one single plug, which cannot be incorrectly plugged in as it only fits one way and the fitting of a head light cannot damage the ECU as it is not interconnected.

[76] Mr Piehl testified that these type of problems do occasionally arise in the Kia Sportage but that it is the exception and not the rule. In fact the plaintiff's vehicle is the first one that he know of in Namibia that had this problem. There were however a few in South Africa (eight (8) to be specific).

[77] During cross-examination Mr Piehl confirmed that an ECU as with any other electronic device it can break and would not last forever and that external factors like wear and tear and high mileage and even extreme conditions like heat can possibly cause breakage. Mr Piehl testified that the ECU is fitted in the front of the vehicle at the engine and is subject to high temperatures. Mr Piehl was however unable to commit himself to a specific 'thing' that would have caused this ECU to have an internal short.

[78] On a question of the court Mr Piehl testified that an internal short in an ECU can take place even if the vehicle is standing still as the system does not switch off

completely but only goes in a sleeping mode like an ordinary computer and a spark in the ECU would cause a short.

Bazill van Rhyn

[79] The third and last witness to testify on behalf of the defendant was Mr Bazill van Rhyn. Mr van Rhyn is employed with the defendant as a Workshop Parts and Quality Controller and has 10 years' experience in the field of panel beating and related work.

[80] Mr van Rhyn testified that he was the supervisor in respect of the repairs done to the plaintiff's vehicle. Mr van Rhyn testified that the repairs to the plaintiff's vehicle was limited to sandblasting damage to the body of the vehicle.

[81] Mr van Rhyn received the plaintiff's vehicle on 21 August 2018 and also did a detailed inspection of the vehicle. The work was completed and the vehicle was reassembled by fitting the head lights and the front bumper three or four days prior to the date of the final inspection on 7 September 2018. The witness testified that he drove the vehicle approximately 40 meters to the wash bay where the vehicle stood idling and he adjusted the headlights manually by using a screwdriver and turned screws on the top of the headlights to ensure that the lights are at the correct angle. In the wash bay there is a line according to which the lights are adjusted. Once this was done he switched the vehicle off and the vehicle was cleaned to be ready for delivery. When Mr van Rhyn attempted to switch the vehicle on to drive it back to the workshop the vehicle would not start.

[82] The witness testified that no work was done on the electrical system of the vehicle and to his knowledge the ECU had nothing to do with the lights of the vehicle and if something was done wrong in respect of the fitting of the head lights then a fuse will blow but will not affect the ECU.

[83] During cross-examination Mr van Rhyn testified that fitting of a head light would not be regarded as electrical work and need not be done by an expert. The witness testified that the light is plugged in and can only be fitted one way. The witness submitted that even a layman would be able to fit a similar vehicle's head lights.

[84] Mr van Rhyn confirmed that the internal short must have occurred between the time after he switched off the vehicle after adjusting the head light and when he wanted to restart the vehicle in the wash bay after the vehicle was washed.

[85] That concluded the case for the defendant.

Closing arguments

[86] During their closing arguments counsel repeated much of what they argued in respect of the absolution of the instance application and I do not intend on repeating the same.-

Onus of proof

[87] The onus of proof and the legal requirements as to the discharge thereof is common cause that plaintiff bears the overall onus of proof.

Discussion and evaluation of the evidence

[88] I had the benefit of hearing three witnesses in respect of each of the parties.

Claim 1

[89] Right of the bat I must say that this is one of those matters where it was essential to hear the evidence of the defendant as the better part of the defence raised lies peculiarly within the knowledge of the defendant.

[90] The plaintiff, Mr Nyamayaro, was a fair witness and is the aggrieved party in these proceedings, and with good reason. Any person that takes his vehicle, which is in a good running condition, in for cosmetic repairs would want his vehicle back in the same condition.

a) The defective ECU

[91] The plaintiff's evidence regarding the nature of the repairs that had to be done to his vehicle is common cause. It is also common cause that whilst the vehicle was in the care of the defendant a defect occurred in the ECU of the vehicle. The issue between the parties comes in with the cause for the defect in the ECU.

[92] When the plaintiff was informed that the defect was in the ECU of the vehicle the plaintiff did what so many people do today… he went knocking on the door of Mr Google for the answer to his problem. The plaintiff based his whole case on his internet research and the conclusions he drew from the information obtained from the internet, instead of calling an expert witness to testify in respect of the cause of the internal short in the ECU. Much can be said for research on the internet but when it comes to matters of a specialized and technical nature it is dangerous to draw final conclusions on that internet information. It is the same as going to "Dr Google" to self-diagnose an illness and take simple medicines based on the self-diagnosis and skip going to a doctor. When doing self-diagnosis with Dr Google the internet simply matches symptoms and may conclude for example that it's a case of the heart attack; however, a more objective analysis by a qualified doctor the diagnosis might be quite different. By self-diagnosing you undermine the role of a qualified and medically trained doctor. If you misinterpret the symptoms and take the wrong medication it can be life-threatening.

[93] In order to determine what the problem was with the vehicle of the plaintiff it was necessary to do a proper diagnostic tests with specialized equipment. The plaintiff was sadly misinformed by the internet regarding the internal systems of the Kia Sportage

vehicle and I am of the view that if the plaintiff sought an expert opinion after having received the report from AMH he might have reconsidered prosecuting this civil claim against the defendant.

[94] One of the main gripes of the plaintiff is that the defendant was supposed to hand back the old vehicle parts to him and that the defendant failed to hand the old ECU back to him. This agreement regarding the old vehicle parts was only reached during the discussions in respect of the partial settlement agreement during May 2019. One must however not lose sight of the fact that at that point the defendant already obtained the new ECU from SIM Technology and the data was transferred from the old device to the new device in South Africa. This was done a good 5 to 6 months before the partial settlement was reached between the parties. Mr Dippenaar testified that he did not receive the old ECU back and that plaintiff at a very belated stage of the current proceedings stated that he wanted the ECU back.

[95] Previously I remarked that it is interesting that the plaintiff did not receive the old or broken ECU back despite the plaintiff asking for it. Having heard the defendant's case it places this request in perspective.

[96] On a side note on the issue of the new ECU, it was suggested in passing that the plaintiff is not convinced that the ECU was replaced. This remark however flies in the face of the evidence of Mr Piehl, who did the diagnostic test of the device and who drafted a report in this regard. A finding and report that is not disputed by the plaintiff.

[97] Even if the plaintiff did not have the ECU the plaintiff would still be able to get an independent expert opinion on the cause of the internal short. An expert would be able to say what the probable causes can be that can cause an internal short and more importantly whether the work done by the defendant on the vehicle could cause the internal short. As indicated the parties are in agreement on the fact that there was an internal short in the ECU. They are just not in agreement as to the cause of the internal short.

[98] The plaintiff chose not to call an expert leaving the court on the one hand with the views of a layman who did some research on the internet and on the other hand the court has the evidence of Mr Piehl, a Kia Master Technician with 21 years' experience and Mr Van Rhyn, who has 10 years panel beating and related experience.

[99] Mr Bangamwabo took issue with the fact that there was no compliance with rule 29 of the Rules of Court in respect of expert witnesses and that Mr Piehl was not declared an expert witness and his curriculum vitae is not before court. I agree with Mr Bangamwabo in this regard, however, Mr Piehl's qualifications and more importantly his years of experience is undisputed and I have no doubt that I will be able to rely on Mr Piehl's as a factual witness, who replaced many Kia Sportage headlights during the course of his career.

[100] Both Mr Piehl and Mr van Rhyn testified that the lights of the vehicle are not reliant on a functioning ECU. Mr Piehl's evidence is very clear that the lights of the vehicle are controlled by the body module unit (BMU) which is a system that operates independently from the engine control unit (ECU). If the ECU is defective the vehicle will not start but the lights would still switch on.

[101] Both the witness were adamant that removing or installing a headlight on a Kia Sportage does not involve auto-electrical work as it is literally plugged in or out and that is the extent of the fitting of the light. In fact Mr van Rhyn went as far as testifying that any lay person will be able to fit their car's headlight as you cannot fit the plug incorrectly and if the light is incorrectly fitted, which it cannot not, it would at most blow out a fuse.

b) Duty of care

[102] It is the case of the plaintiff that the defendant failed to repair the vehicle for sandblasting problems as agreed upon and the defendant failed to complete the repairs

within a reasonable time. From the evidence of the plaintiff and the defendant it is clear that this statement in patently incorrect as the defendant completed the sandblasting work by 7 September 2018. The plaintiff also agreed that the sandblasting repairs were done satisfactorily in spite of his complaint that he was not acknowledged in the process of signing off the panel beating work and that the ultimate payment of the N$ 97 125.99 by the plaintiff's insurer was done without his input.

[103] The plaintiff received his vehicle only on 15 May 2019 but it was not as a result of a delay on the repair of the sandblasting damage. It would appear from the evidence before this court that the repairs in the respect of ECU was completed by 14 February 2019 and the vehicle remained at the workshop of the defendant as the plaintiff was unwilling to collect the vehicle.

[104] The second issue that the plaintiff took pertinent issues with is that the defendant a) failed to take reasonable steps in repairing the vehicle with the necessary care and diligence and as a result the motor vehicles starter stopped working, and b) that the defendant was negligent and/or failed to take reasonable care during the repair of the vehicle due sand blasting and as a result, the vehicle's computer box was burned and/or damaged.

[105] The evidence of Mr van Rhyn was that the repair work to the vehicle was done three or four days prior to the delivery date of the vehicle, i.e. 7 September 2018. The vehicle was reassembled by fitting the panels of the vehicle, fitting the new headlights and refitting the front bumper. Three/four days after the completion of the work the witness started the vehicle and drove it to the wash bay to adjust the headlights as there is a line in the wash bay according to which the angle of the headlights are set. The vehicle was idling whilst the witness adjusted the lights. The adjusting of the lights is done by the turning of a screw on the top of the light. This means that at this stage the ECU of the plaintiff's vehicle was still in working order. After the vehicle was switched off it was washed and then it would not start again. During that period none of the defendant's employees were working on the vehicle.

[106] From this evidence it is clear that the ECU was not damaged as a result of the sandblasting repairs.

[107] Mr Bangamwabo placed a lot of emphasize on the duty of care arising from the contractual relationship between the parties and argued that this duty of care was violated by the defendant. I take no issue with Mr Bangamwabo's argument that the defendant had a general duty to prevent loss or damage to the plaintiff's vehicle entrusted to it to repair but this duty of care has limits and if the damage is remote or so far removed from anything that the defendant could foresee the question must be asked if the defendant can be held liable.

[108] The evidence of Mr Piehl is that defective ECU's in a Kia Sportage is something that is exceptional. His evidence is that the plaintiff's vehicle is the first in Namibia that suffered this fate and there were about 8 vehicles with a similar problem in South Africa.

[109] I am of the view that regardless of the steps that the defendant's employee take nobody, not even the plaintiff, could have foreseen that the ECU would suffer an internal short.

[110] Having said that, I can in any event not find that there is a causal link between the work done on the plaintiff's vehicle by the defendant's employees and the short in the ECU and can therefore not find that defendant breached the general duty of care it had in respect of the plaintiff's vehicle. As a result claim one cannot succeed.

Claim 2

[111] The second claim of the plaintiff relates to the monies paid to Mr Shilume in respect of the rental vehicle during the period that his vehicle was still under the care of the defendant.

[112] The main witnesses in this regard was the plaintiff and Mr Gabriel Shilume. The plaintiff confirmed the lease agreement which relates to a 2004 model BMW that he leased from Mr Shilume from 24 September 2018 to 14 February 2019 at a rate of N$ 550 per day. The plaintiff's evidence is that he leased the vehicle from Mr Shilume as the payment was more flexible rather than making use of the services of car rental companies.

[113] What is interesting regarding the arrangement was that the plaintiff had to make cash payments because Mr Shilume's account was overdrawn, however there is no documentary proof of any payments made by the plaintiff. He had to pay approximately an amount of approximately N$ 17 000 per month to Mr Shilume, which meant he had to physically draw cash to make this payment. One would expect the plaintiff to present bank statements showing the withdrawal of these large cash amounts and one would expect that these withdrawals would reflect in the plaintiff's bank statements for at least 9 months.

[114] Then there is the issue of receipts. The plaintiff and Mr Shilume deemed it necessary to draft a lease agreement setting out the terms of the agreement yet Mr Shilume did not issue a single receipt to the plaintiff nor did the plaintiff insist on any invoices. The formalities regarding the lease agreement of the vehicle thus stopped at the lease agreement.

[115] Mr Shilume testified that he recorded some of the payments in a diary that is locked in a garage in Katutura and the key is with a lady that was out of the country at the time.

[116] The result is that there is no a single piece document before this court evincing that payment was indeed made in terms of the lease agreement.

[117] It is the defendant's case that the lease agreement is a simulated agreement between two friends designed to mislead the court.

[118] I am in accord with Mr Theron that the lease agreement on which the plaintiff relies is questionable and I say this for the following reasons (apart from the obvious one that there is no documentary proof to support any payments made in terms of the agreement):

a) The model of the vehicle is recorded as a 2004 model and the plaintiff's evidence was tested in this regard during cross-examination and more specifically regarding the excessive amount that was paid for such an old car and the plaintiff never corrected the position that the vehicle is not a 2004 model but rather a 2014 model. Even if it was just to justify the lease amount.

b) Mr Shilume testified that the vehicle was not a 2004 model but indeed 2014 and that it was a human error reflecting the wrong model in both the lease agreement and his witness statement. Yet Mr Shilume does not present the registration papers of the vehicle to court to show the true model of the vehicle.

c) Mr Shilume testified that he drafted the lease agreement and on the date when the agreement was signed he ensured that it complied with the Stamp Duty Act, 15 of 1993, yet the agreement was only stamped on 18 August 2019.

d) In spite of the fact that the plaintiff paid N$ 79 200 to Mr Shilume for the lease of the BMW, an amount that is almost double the amount initially claimed for the ECU, the plaintiff testified that he was not interested to pursue a claim to recover this amount and only did so on the advice of his legal practitioner. This makes absolutely no economic sense. One would think that this is the claim to pursue from the onset.

e) The plaintiff leased the vehicle from Mr Shilume due to a 'flexible' payment arrangement, yet Mr Shilume stated that the plaintiff diligently paid on time

and if he missed a payment it will be by a short period. He stated not even a week would pass and then he would be paid.

f) If the plaintiff made such a diligent and timeous payments then one must wonder why the plaintiff did not rent a vehicle from a car rental company at a lower price for a newer mode.

[119] The onus is on the plaintiff to proof on a balance of probabilities that he suffered a loss of N$ 79 200. This court was not placed in a position to find in favour of the plaintiff for reasons set out in my discussion above.

Counterclaim

[120] The defendant filed a counterclaim for the storage fees of the plaintiff's vehicle in the amount of 14 February 2019 to 15 May 2019 in the total amount of N$ 18 630 (Including VAT).

[121] Mr Dippenaar testified that on 7 February 2019 the plaintiff was advised by e-mail to collect his vehicle against the payment of the costs of the new ECU and the insurance excess payment. In the said e-mail the plaintiff was also advised that should he fail to collect his vehicle the defendant would charge storage or standing fees at a rate of N$ 180 per day (excluding VAT).

[122] It is common cause between the parties that the plaintiff received this e-mail as he confirmed as much during his evidence. This e-mail is however not before this court.
[123] Apart from that e-mail there is no evidence present before this court that there was any agreement between the parties, either expressly or tacitly that the plaintiff would to pay storage fees if for whatever reason the vehicle was not collected on time.

[123] The only document that relates to the vehicle was signed by Ms Kasetura (on behalf of the plaintiff) and was submitted into evidence as exhibit M. This is the form

that was completed when the vehicle was inspected in the presence of the client. Ms Kasetura agreed by signing the document that a more detailed inspection could be done in her absence and further that she in essence acknowledges that PZN would not be liable of any personal belongings left in the car.

[124] The document signed on behalf of the plaintiff does not contain anything that would place any obligation on a customer to pay storage fees if the vehicle is not collected as agreed between the parties.

[125] I get the impression that the counterclaim for storage fees is an afterthought on the part of the defendant and it is noticeable that there is no averment in the defendant's plea that the amount of N$ 180 per day (excluding VAT) was agreed upon or that it constitutes a usual or normal storage cost for a vehicle. In fact the defendant only pleaded that the plaintiff's vehicle took up business space of the defendant, which is panel beater shop and as a result the vehicle attracted storage fees.

[126] I would have expected that if there was an agreement between the parties to pay storage fees that the defendant would have issued invoices for storage fees on a monthly basis. This did not happen. There was only reference in the email to storage costs/standing fees (I am not sure of the exact wording of the email) and subsequently storages fees were pleaded on 2 August 2019.

[127] I am of the view that in the absence of agreement on the storage costs there can be no contract between the plaintiff and the defendant, the defendant would not be entitled to the claim for storage costs.

[128] In any event, it is the evidence of the Mr Dippenaar that the plaintiff refused to pay either the excess fee or the replacement costs of the new ECU and as a result the defendant exercised a *lien* over the vehicle.

[129] The court stated the following in *Thor Shipping and Transport SA (Pty) Ltd v Sunset Beach Trading 208 CC*[2] in respect of a lien-holder's entitlement to storage charges:

'[28] As to the enrichment claim, counsel for the plaintiff made no submissions in support of it. Assuming it to be arguable that some level of enrichment (and matching impoverishment) arose because the second defendant had his vehicle kept safe without charge for the storage period, the answer to the claim would probably lie in the proposition that a lien-holder keeps possession for its own benefit, as a result of which it is not entitled to claim compensation by way of storage charges. (See in this regard the full court decision in *Wessels v Morice* (1913) 34 NPD 112; and *Laingsburg School Board v Logan* (1910) 27 SC 240.)'

[130] In light of the aforementioned authority I remain fortified in my view that the defendant would not be entitled to storage fees and the counterclaim can therefore not succeed.

Order:

1. The plaintiff's claims are dismissed with costs.
2. The defendant's counterclaim is dismissed with costs.
3. The matter is removed from the roll and is regarded as finalised.

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Prinsloo JS

Judge

[2] *Thor Shipping and Transport SA (Pty) Ltd v Sunset Beach Trading 208 CC* 2017 JDR 1771 (KZP) at para [28].

APPEARANCES

PLAINTIFF:	Mr F Bangamwabo Of FB Law Chambers, Windhoek
DEFENDANT:	Mr P Theron Of PD Theron & Associates, Windhoek