**IN THE HIGH COURT FOR ZAMBIA** **2016/HP/1733**

**AT THE PRINCIPAL REGISTRY**

**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*


**BETWEEN:**

**ANNIE CHINYANTA UDALOR** **PLAINTIFF**

**AND**

**SHULNAM COMMODITIES LIMITED** **DEFENDANT**

***BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO, IN OPEN COURT, ON 31ST AUGUST, 2020.***

*For the Plaintiff:* *Mr. H. M. Musanje - Messrs. H. M. Musanje & Co.*

*For the Defendant:* *Mr. T. Chali - Messrs. H. H. Ndhlovu and Co.*

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# JUDGMENT

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***CASES REFERRED TO:***

1. *Robert Simeza and 3 others v Elizabeth Mzyece - S.C.Z Judgment No. 23 of 2011;*
2. *Zambia Railways Limited v Pauline S Mundia, Brian Sialumba (2008) Z.R. 287 vol. 1 (S.C);*
3. *Blyth v Birmingham Water Company (1856) 11Ex 781;*
4. *Naomi Malama v Edwin Chinda Chisenga - Appeal No. 135/2017;*
5. *Anns v London Borough of Merton (1977) 2 ALL E.R. 492;*
6. *Donoghue v Stevenson (1932) A.C. 562;*
7. *Nettleship v Watson (1971) 2 QB 691;*
8. *Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172;*
9. *Mazoka and Others v Mwanawasa and Others (2005) Z.R. 138;*
10. *Hadley v Baxendale (1854) 9 EXCH 341; (1843-1860) All ER Reprint 461; and*
11. *The Mediana (1900) AC 113.*

2. *Phipson on Evidence, Seventeenth Edition, (Thomson Reuters (Legal) Limited 2010).*

## 1 BACKGROUND

1.1 The Plaintiff herein issued a Writ of Summons dated 6th September, 2016, against the Defendant with claims for the following relief: -

1. *Damages for negligence;*
2. *An Order for the replacement of BMW X5, 2000 model, motor vehicle engine;*
3. *Damages for mental distress, inconvenience and loss of use of motor-vehicle BMW X5 registration No. AJC 607;*
4. *K48,750.00 in special damages for hire charges incurred between 6th December, 2015 to 3rd February, 2016 and 27th July, 2016 to 10th August, 2016;*
5. *Costs; and*
6. *Further or other relief the Court shall deem fit.*

1.2 By her Statement of Claim filed on the 6th of September, 2016, the Plaintiff averred, *inter alia,* as follows: -

1. *That on or about the 2nd of December, 2015, the Plaintiff who was a regular customer of the Defendant, drove her motor-car, registration no. AJC 6014 to the Defendant's service station at Kabulonga for the purpose of refuelling, general and routine checks of engine oil and water radiator;*
2. *That at all material times, the Defendant was aware that after its servants and/ or agents had carried out the services offered by and at their service station, the motor vehicle would be used on the road by the Plaintiff and the members of her family and friends, and that, in the absence of reasonable care on its part, damage would or might result in the course of using the said motor vehicle;*

3. *That on the 2nd of December, 2015, after the Defendant purportedly carried out the said services, while the Plaintiff was driving her car with her children as passengers along Thabo Mbeki Road in Lusaka, the said motor vehicle overheated and the Plaintiff and other road users noticed a plume of fumes emitting from the bonnet of the Plaintiff's car, in consequence whereof, the Plaintiff got extremely scared for her life and those of her children;*
4. *That the Plaintiff parked the motor-vehicle at Puma Filling Station Arcades, Lusaka where it was discovered that the lid/breather from the radiator was missing and the Defendant was notified;*
5. *That on the 3rd of December, 2015, the Plaintiff noticed that the car had again started to overheat and that she almost caused an accident due to a panic attack. The Defendant collected the motor-vehicle and parked it at its premises as a result of which the Plaintiff was compelled to hire a car for her daily business use and errands;*
6. *That after some weeks, the Defendant called the Plaintiff to inform her to collect the car as it had allegedly been worked on. However, the Plaintiff was sceptical of the works done on the car as it seemed that only the lid/breather and radiator coolant had been replaced and filled, hence her insisting that a second professional opinion be sought which did not sit well with the Defendant;*
7. *That on the 23rd of June, 2016, the Plaintiff agreed with the Defendant that she would without forbearance collect the motor-car and on the 24th of June, 2016, the Defendant handed over the car to the Plaintiff;*
8. *That on or about the 22nd day of July, 2016, while the Plaintiff was driving along Vubu Road, Emmasdale, Lusaka, the car over heated and at the same time*

*profusely started emitting dark smoke and the engine cut off, which caused the Plaintiff to suffer loss and damage;*

9. *The Plaintiff outlined the particulars of special damage as the Cost of hiring a car from Benmark Transways and Car hire for 75 days at K550 per day which cost her K48,750.00 in total;*
10. *That the damage to the Plaintiff's motor-vehicle and the said loss and damage were occasioned to the Plaintiff by reason of the negligence and breach of duty on the part of the Defendant, its servants or agents. The Particulars of Negligence were outlined as follows: -*
    a) *Failing to replace and tighten the radiator lid after service;*
    b) *Failing to make any or any reasonable or adequate or exercise due care and diligence in carrying out the required service on the motor-vehicle;*
    c) *Failing to ascertain or ensure that the radiator lid/breather was affixed before allowing the motor vehicle to be driven away after service;*
    d) *Failing to provide any or sufficient and professional mechanical expertise to rectify the mechanical fault accessioned to the motor vehicle on two subsequent occasions;*
    e) *Allowing and falsely assuring the Plaintiff on two occasions that the motor-vehicle was roadworthy and fit to be driven when they knew or ought to have known that the same was unfit, unsafe and dangerous to be driven thereby putting the Plaintiff's life and those of her children in great peril.*

1.3 In its Defence and Counter-Claim filed on the 22nd of September, 2016, the Defendant stated, *inter alia,* that it denies that there was negligence on its part and that it did not replace the lid of the radiator. The

Defendant averred that it bought a new radiator cap for the Defendant out of good will after the Plaintiff claimed it was missing. The Defendant further averred that it was out of good will and respect for its regular customer that it took the Plaintiff's car to the dealers of BMW in Zambia, Pilatus Engineering, at the Defendant's cost, who worked on the car and returned it. The Defendant denied that the Plaintiff doubted the professionalism of Pilatus Engineering as she was informed by her garage that Pilatus was the only dealer of BMW in Zambia. The Defendant admitted that the Plaintiff was sceptical of the works done on the car and insisted that a second professional opinion be sought and that on or about the 23rd of June, 2016, the Plaintiff agreed with the Defendant that she would without forbearance collect the motor vehicle. Finally, the Defendant denied the particulars of special damage and negligence as close to a month had passed since the Plaintiff collected the motor vehicle from the Defendant and therefore, it did not know what the Plaintiff did to her car during that period.

1.4 In its Counter-Claim, the Defendant avers that the Plaintiff was informed by the Defendant to collect the car from the Defendant's premises on the 26th of January, 2016, as it was incurring storage and security costs of K1,200.00 per day for looking after her car, but that the Plaintiff refused to collect the car. The Defendant further averred that the Plaintiff only collected the car on the 24th of June, 2016, after a

total of 149 days and that the Defendant incurred a cost of K178,000.00 in keeping her car secured. The Defendant therefore counter-claims as follows: -

*a) Sum of K178,800.00 being storage and security charges;*

*b) Costs; and*

*c) Any other relief the Court may deem fit.*

1.5 In her Reply and Defence to the Counter-Claim filed on the 4th of October, 2016, the Plaintiff stated that she would rely on the contents and full effect of her letter to the Defendant dated the 5th of February, 2016 receipt whereof was acknowledged by the Defendant.

1.6 In her Defence to Counter-Claim, the Plaintiff denied that she refused to collect the car and that the Defendant incurred storage and security charges of K1,200.00 per day and all the costs alleged in the Defendant's Counter-Claim

## 2 EVIDENCE AT TRIAL

2.1 At trial, the Plaintiff, Annie Chinyanta Udalor was PW1. She testified that she was the owner of a BMW X5 registration number AJC 6014 and that on the 2nd of December, 2015, she went for a routine check-up at Puma Filling Station. Since the person that usually does the check-up was busy, he asked someone else to do it. That person put coolant and after he was done, PW1 drove off towards Emmasdale. As she was driving towards Arcades, motorists were flashing their lights at her and told her that her car was smoking. When she looked at her dash board she noticed that it

indicated that the temperature was very high and she parked her car at Arcades car park. She stated that she left her car with her children and went to Puma filling Station at Arcades and asked a Petrol attendant to assist by checking the car. When he opened the bonnet of the car to check, he said that there was nothing he could do to assist as the breather was not there.

2.2 PW1 left the car at Arcades and took a taxi to Puma filling Station in Kabulonga to complain. One of the Petrol attendants made a call to their manager, who told her that there was nothing he could do at that time and that she should return the following morning. The next morning, on the 3rd of December, 2015, she went back to Puma Filling Station and spoke to the Manager who referred her to the Human Resource Manager who told her that he would send over a mechanic. The Human Resource Manager and Mechanic went to where the car was parked and said that they would buy a breather. She left the car with them.

2.3 The next morning, on the 4th of December, 2015, she received a call from the Defendant Company and they requested her to go and pick up her car from where it was parked at Serenity Lodge and she picked it. According to PW1, on the same day as she was going to Emmasdale along Vubu Road, other motorists started flashing their lights at her and told her that there was smoke that was being emitted from her car

and when she looked at her dash board, it indicated that the temperature was very high and that the car had over heated. PW1 stated that she was very scared and parked the car on the side of the road. She called the Human Resource Manager of the Defendant Company to tell him what had happened and he told her to call the mechanic and tell him where she was. PW1 had the car pushed to her sister's place where she waited for the Mechanic from the Defendant company. The Mechanic came after a few hours and requested PW1 to call the Human Resource Manager whom she requested to send a toll truck to the premises so that he could take the vehicle to the Defendant's premises.

2.4 PW1 further testified that the following day she was called to go to the Defendant company's premises and whilst there she was told by the Mechanic that he was trying to determine the problem with the car. On the 5th of December, 2015, she was told that the Defendant company would take it to Pilatus.

2.5 On the 26th of January, 2016, the Defendant company's representative called her and told her that the car was ready for collection. They explained to her that it was the radiator lid of the car that had a problem. PW1 was sceptical about this explanation as her car had never had such a problem before and refused to collect it. She further informed the Defendant company's representative that she would be seeking a second opinion. The Defendant Company's

representative told her that they would be charging her for the storage of the car.

2.6 Furthermore, her testimony was that she gave them an invoice for the car that she had hired during the period that the Defendant company was working on her car. She had hired a Mercedes Benz for close to a month and referred the Court to Page 1 of the Plaintiff's Bundle of Documents, which contained the said invoice from Benmark Transways and Car Hire. The invoice indicated that PW1 had hired the said car from the 6th of December, 2015 to the 3rd of February, 2015, at a rate of K550 per day for 60 days. It also indicated the sum of K39,000.00 as the total sum due and payable.

2.7 PW1 stated that the Defendant company's representative said that the Defendant company would pay a certain amount towards the said total sum. To her surprise, the Defendant company's representative wanted to charge her K1,000.00 plus for storage when they were the ones that caused the problem to her vehicle and she told them that she would not pay that amount.

2.7 PW1 collected the vehicle and later realised that it was still overheating and decided to park it at her sister's place. She then decided to call her lawyer to explain what had happened. She further stated that she wanted the Court to consider her claims and for the Defendant to take full responsibility for the damage to the car.

2.8 In Cross-Examination, PW1 testified that she took her car to the Defendant company for refuelling and that she did not tell the Defendant to check her car for water. She conceded that her testimony was contrary to her averment contained in paragraph 3 of her Statement of Claim where she stated that she had asked them to check for water in her radiator. She further stated that when her car developed a fault near Arcades she could not call a mechanic as she did not know what the problem was.

2.9 According to PW1, the Defendant company accepted the fault as theirs, hence their sending a mechanic and the car to Pilatus Engineering. She further testified that she refused to pick up the car as she did not know what had transpired at Pilatus and she was therefore looking for another garage to get a second opinion. PW1 testified that she was aware that the Defendant company started charging storage from the 26th of January, 2016, when she refused to pick the car and that she continued to hire the Mercedes Benz even after the said date as the Defendant had not provided her with an alternative car to use, but that she had no evidence before Court to show that she had asked for an alternative car.

2.10 PW1 testified that page 5 of the Defendant's Bundle of Documents showed the date on which the Defendant informed her that they would be charging for storage and that the said letter merely contained the Defendant's proposals that she did not agree with.

PW1 was referred to page 6 of the Plaintiff's Bundle of Documents and she testified that she was demanding a good car and not a brand new car as stated in her Statement of Claim.

2.11 PW1 testified that she could not understand the contents of the Defendant's letter to her, dated the 4th of March, 2016, contained on page 4 of the Defendant's Bundle of Documents wherein the Defendant made a further request for her to collect the car, failure of which she would accumulate storage charges. She further stated that she refused to collect the car as there was still a dispute to be resolved, but could not provide proof of the said dispute. When referred to page 9 of the Defendants Bundle of Documents, PW1 conceded that the said document was a Hand Over Certificate, dated the 24th of June, 2016 and that she personally received her car. She further conceded that she did not indicate any defect of the car on the said Certificate and that she willingly collected the Hand Over Certificate. PW1 testified that she did not test drive the car when she collected it as she saw no need for that and that no one stopped her from test driving it.

2.12 When referred to paragraph 15 of the Statement of Claim, PW1 testified that it stated that the car gave her problems on the 27th of July, 2016. She further testified that she was not using the car much as she was campaigning. That the car was mostly parked and the said stated date was the only date that she

used it for long distance driving. However, she conceded that she had no evidence to show that the car was parked during her campaigns.

2.13 When referred to the fourth claim on the Statement of Claim at page 6 of the Plaintiff's Bundle of Pleadings, PW1 stated that it was a claim for the sum of K48,750.00 being Special Damages for hire charges between the 6th of December, 2015, to the 3rd of February, 2016 and from the 27th of July, 2016, to the 10th of August, 2016. She further stated that the said sum included the period that she hired a car from July to August, 2016, but that she had no evidence before Court to show that she had hired a car for that period.

2.14 PW1 conceded that it was prudent for the Defendant to hire security so as to prevent the car from being stolen and that the space that her car took could have been used by another car.

2.15 During Re-Examination, PW1 testified that she was aware that the Defendant' premises were not used for repairs but that she went there for a routine check up of oil, coolant, water and refuelling. She further stated that the Defendant taking her car to Pilatus was not a good gesture as it was its duty to do so because they had damaged her car. She clarified that in her Statement of Claim she was demanding a new engine for her car and not a brand new car. PW1 also stated that she did not indicate any defects on the Hand Over Certificate as the body of the car looked fine and she could not tell if there were any defects.

2.16 PW2 was Steven Kasembe, a mechanic who gave expert evidence in relation to the Plaintiff's vehicle. He testified that a number of problems could cause over-heating of a vehicle, such as a blocked radiator, a faulty water pump, faulty radiator cap, slight leakage on the radiator or radiator hose and if the cooling fan stopped working. PW2 testified that a BMW vehicle and Land Rover have a bleeder which bleeds the air contained in the water circulation. He further stated that if there is an opening on the bleeder the water would not circulate and would be coming out, which would result in the car overheating.

2.17 According to PW2, the consequences of a motor vehicle over heating are that there would be a lot of wear, the engine would get damaged and as a result the motor vehicle would malfunction. He testified that a driver of a BMW would be able to tell if the engine is overheating when the temperature gauge on the dash board indicates higher than 90 degrees or when smoke fumes are seen coming from the engine. He further stated that if the bleeder on a BMW has not been screwed in its right place, it will run out of coolant or water and cause the motor vehicle to overheat. That thereafter, the engine could get damaged as it is made of aluminium, which has a low melting point. PW2 also testified that if such damage occurred to an engine, it would need to be taken out and the damaged parts checked, which is very expensive and that other than that, there was not any other remedy.

2.18 In Cross-examination, PW2 testified that he had a City's Guild Certificate in Mechanics. He stated that his studies were general and had no specifications on the types of motor vehicles, but stated that he was an expert in the BMW brand. He testified that his expertise arose from his field of study and experience and though the model of BMW Motor vehicle in this case was made after he had finished his studies, he had a manual for BMW. He further testified that it was not necessary for him to be a franchise holder for BMW for him to know about the make. That if he used search engine Google, he would get all that he needed to know about a particular model.

2.19 PW2 stated that though he did not work on the car in question, he knew what would happen when a BMW over heats. He further stated that the rubber in the radiator cup does finish and requires replacement. When referred to page 6 of the Plaintiff's Bundle of Pleadings and particularly to the second claim, PW2 testified that in December, 2015, the car could have been 15 years old. When referred to pages 2 to 3 of the Defendant's Bundle of Documents, PW2 testified that it was a Job Card from Pilatus which indicated that the brake adjustment, oil service, engine wash and diagnosis of the overheating was done. Furthermore, he testified that Pilatus recommended that a radiator cap be replaced and radiator coolant be put in. He also testified that of all the causes of

overheating, Pilatus only identified one, which was replacement of the radiator cap.

2.20 There was no re-examination of PW2 and that marked the close of the Plaintiff's case.

2.21 When the matter came up for continued trial, the Defendant and its Counsel were absent without advancing any reasons, despite being aware of the date of hearing. Therefore, this Court closed the case and gave an opportunity to both parties to file their written submissions. No submissions were filed by both parties. It is trite law that where a party does not appear for a hearing, in the absence of sufficient reason justifying their non-appearance, a Court may proceed to hear the matter and give Judgment on the basis of the evidence adduced by the Plaintiff. This is as provided by ***Order XXXV***, ***Rule 3*** of ***The High Court Rules***[1], which is couched as follows: -

> ***"If the plaintiff appears, and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the Court may, upon proof of service of notice of trial, proceed to hear the cause and give judgment on the evidence adduced by the plaintiff, or may postpone the hearing of the cause and direct notice of such postponement to be given to the defendant."*** *(Court's emphasis)*

2.22 My decision to close the matter is further fortified by the case of ***Robert Simeza and 3 others v Elizabeth Mzyece***[1] where the Supreme Court stated as follows: -

> ***"There is no procedural injustice occasioned when a party who is aware of proceedings does not turn up."***

## 3 LAW

3.1 I have considered the Pleadings and evidence adduced before this Court. The Plaintiff claims, *inter alia,* damages for negligence; an order for replacement of a BMW X5, 2000 model, motor engine; damages for mental distress, inconvenience and loss of use of motor vehicle BMW X4 Registration No. AJC 604; and K48,750.00 in special damages for hire charges incurred. The burden of proof is on the Plaintiff to prove her claims to the required standard. The Supreme Court in ***Zambia Railways Limited v Pauline S Mundia, Brian Sialumba***[2] held that: -

> ***"The standard of proof in a civil case is not as rigorous as the one obtaining in a criminal case. Simply stated, the proof required is on a balance of probability as opposed to beyond all reasonable doubt in a criminal case. The old adage is true that he who asserts a claim in a civil trial must prove on a balance of probability that the other party is liable..."***

3.2 The facts in this matter are that on 2nd December, 2015, the Plaintiff who was a regular customer of the Defendant drove her car to the Defendant's service station at Kabulonga for the purpose of refuelling, general and routine checks of engine oil and water in the radiator, which services were carried out by the Defendant. On her way from the service station, the car overheated and she was alerted to fumes emitting from the car by other road users. Upon parking the car at Puma Filling Station, Arcades, it was discovered

that the lid/breather from the radiator was missing. The Plaintiff notified the Defendant, who replaced the lid/breather, but this did not stop the car from overheating. Subsequently, the Defendant took the car to Pilatus Engineering, which worked on the car but the Plaintiff was not satisfied with the repairs, thus she took long to collect the car. The Plaintiff alleges that the Defendant failed to replace and tighten the radiator lid after service, which led to the car being damaged. On the other hand, the Defendant alleges that it is not responsible for the damage to the Plaintiff's car and only replaced the lid and took the car to Pilatus out of good will and respect for a regular customer. The Defendant thus Counter-Claimed K178,000.00 being storage and security charges incurred in looking after the Plaintiff's car.

3.3 The issues for determination before this Court are whether or not the Defendant negligently caused the alleged damage to the Plaintiff's motor vehicle and whether or not the Plaintiff is liable to pay the Defendant the sum of K178,800.00 for storage and security of the Plaintiff's Motor vehicle.

3.4 In order to address the various issues raised by the parties, it is necessary to provide context to what amounts to negligence. In the case of ***Blyth v Birmingham Water works Company***[3], negligence was defined in the following terms: -

> ***"Negligence is the omission to do something which a reasonable man, guided upon those considerations***

***which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."***

3.5 Further, the Court of Appeal in the case of ***Naomi Malama v Edwin Chinda Chisenga***[4] stated as follows: -

***"There are four elements of negligence, namely duty of care, beach, causation and damages. Each is an essential component of a legal claim that must be established."***

## 4 ANALYSIS AND FINDINGS

4.1 The Plaintiff alleged negligence on the part of the Defendant in the discharge of its services to the Plaintiff by failing to replace and tighten the radiator lid after service. On the authority of the foregoing cases, I will now proceed to determine whether the issues raised by the Plaintiff in this case satisfy the elements of the tort of negligence. In order to determine whether the Defendant owed a duty of care to the Plaintiff, I am guided by the principles laid down in the case of ***Anns v London Borough of Merton***[5], where Lord Wilberforce stated as follows: -

***"...the question has to be approached in two stages. First one has to ask whether, as between the alleged wrong doer and the person who has suffered damages there is sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first duty question is answered in the***

***affirmative, it is necessary to consider whether there are any considerations which ought to negate, or reduce or limit the scope of the duty or the class of a person to whom it is owed or the damages to which a breach may give rise."***

4.2 From the evidence adduced at trial, the Plaintiff took her car to the Defendant's Service Station for the purpose of refuelling, general/routine checks of engine oil, coolant and water in the radiator. The Plaintiff's vehicle was checked and serviced by the Defendant. This testimony was not contested at trial and I find that the Defendant in attending to the Plaintiff's car owed her a duty of care, as in the reasonable contemplation of the Defendant, carelessness on its part was likely to cause damage to the Plaintiff. Additionally, there are no considerations that have been availed to the Court that tend to negate or limit the scope of the said duty.

4.3 Having established that the Defendant owed the Plaintiff a duty of care, it becomes necessary to determine whether the Defendant acted in such a way as to have breached the said duty of care. The standard of care expected of a Defendant is that of reasonable man as was held in the case of ***Donoghue v Stevenson***[6]. The general rule is that defendants are expected to act with a reasonable level of skill in the activity they are undertaking. This position is fortified by the case of ***Nettleship v Watson***[7], where the Court held as follows: -

***"Someone who undertakes a task should be judged against the standard of a reasonably qualified, competent person undertaking that task."***

4.4 Based on the foregoing authorities, if it is shown that the Defendant did not act with a reasonable level of skill in conducting general and routine checks of the engine oil, coolant and water in the radiator of the Plaintiff's car, it will be deemed to have breached the duty of care that it owed to the Plaintiff. As earlier stated, the burden of proving the aforesaid breach, lies with the Plaintiff. This position is fortified by the case of ***Masauso Zulu v Avondale Housing Project Limited***[8] where the Supreme Court held as follows: -

***"...where a plaintiff... makes any allegation, it is generally for him to prove the allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponent's case."***

4.5 Additionally, in the case of ***Mazoka and Others v Mwanawasa and Others***[9], the Supreme Court held as follows: -

***"As regards burden of proof the evidence adduced must establish the issues raised to a fairly high degree of convincing clarity."***

4.6 The Plaintiff's undisputed evidence is that she went to the Defendant's Service Station on 2nd December, 2015 and the fault on her car developed shortly after leaving the Defendant's service station on the same date. The Plaintiff adduced evidence that after leaving the Defendant's place she drove along Thabo Mbeki Road,

where other motorists brought to her attention that her car was smoking. She stopped and noticed that the temperature was high and went to Arcades' Puma Filling Station where the attendant that looked at the car said the radiator lid was missing and that is why the car over heated. On the second occasion similar evidence was also lead by the Plaintiff. This evidence was not rebutted by the Defendant. Accordingly, the Plaintiff gave the Court a probable date on which the car was taken to the Defendant for servicing, which fact was admitted by the Defendant in its defence, thus she adduced sufficient evidence to prove that the fault on the car developed on the same day that it was taken to the Defendant's Filling Station for the service. The period between the service of the car by the Defendant and when the fault occurred, points to the likelihood that it was the Defendant who had failed to replace the radiator cap after the service.

4.7 On analysis of the evidence on record I find that the Plaintiff has adduced sufficient evidence that supports her allegations that the Defendant failed to replace the radiator lid after the service of the car in question. In my view, the sequence of evidence stated by the Plaintiff from the opinion of the attendant from Puma Filling Station at Arcades, the mechanic sent by the Defendant, PW2 who testified as an expert in BMW Model vehicles, giving an account of the various instances in which a vehicle could overheat and the finding of Pilatus Engineering confirm that the

Defendant's attendant did not perform his services to the level of the calling of his profession. Since I find that the Defendant owed the Plaintiff a duty of care, that duty was not properly discharged. Further, by taking the car for repairs the Defendant impliedly accepted its failure to discharge its duty to the Plaintiff. The act of repairing the vehicle by the Defendant at its cost sufficiently absorbed the Defendant of its liability for damages for the breach of the duty of care as found above. Accordingly, I only find that the Defendant is liable to pay for the hiring charges incurred by the Plaintiff at K550.00 per day from 6th December, 2015, to 26th January, 2016, being the date that the car went into the garage at Pilatus Engineering to when it was ready for collection. As already said above, damages for actual breach of the duty of care were compensated by the action of the Defendant to repair the vehicle at its cost.

4.8 This now brings me to the issue of whether or not the Defendant remained liable to the Plaintiff after the car was worked on by Pilatus Engineering. According to the evidence adduced, after the Defendant, through Pilatus Engineering carried out the diagnostic checks on the car and replaced the radiator cap and coolant at its own expense, the Plaintiff collected the vehicle from the Defendant on the 24th of June, 2016, with no complaint until about a month later, when she alleged that the car had over heated again and the engine cut off. The Plaintiff did not adduce any evidence such as

a mechanical report to show that the car over heated and the engine cut off as a consequence of the works done to the car by the Defendant nor did she show that following the collection of the car from the Defendant, no further works were done to it.

4.9 The Plaintiff needed to have led evidence from an expert to confirm whether or not the first omission by the Defendant was still blameworthy for this second fault considering the time that had passed between the two incidents and the age of the car. She did not adduce any such evidence. Therefore, it is this Court's view on the malfunction of the car after one month of use by the Plaintiff, that no evidence has been led that the same original fault caused by the Defendant was the same one that caused this second problem. The Plaintiff needed to have led cogent evidence in this regard and did not. Consequently, she failed to show causation to this second malfunction attributable to the Defendant according to the old case of ***Hadley v Baxendale***[10] on causation.

4.10 I am of the considered view that once the car was repaired by Pilatus Engineering, the Defendant was no longer liable to the Plaintiff. The absence of expert evidence on the condition of the car means that I cannot competently come to a conclusion about the state of the car.

4.11 Based on the foregoing, I find that the Plaintiff has failed on a balance of probabilities to show that the Defendant breached any duty of care to the Plaintiff in

relation to the second break down of the Plaintiff's vehicle after one month of use from the time it was repaired by the Defendant. The Plaintiff's claim for the replacement of a BMW X5, 2000 model, motor vehicle engine, founded on the second break down is dismissed.

4.12 It also follows that the Plaintiff is not entitled to car hire refund from the date the car was ready for collection and she refused to collect it. My view is fortified by the case of ***Hadley v Baxendale***[10] where the principle espoused therein can also be applied herein. The Court of Exchequer held therein that: -

> ***"...Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself..."***

4.13 The Plaintiff also claimed for damages for mental distress, inconvenience and loss of motor-vehicle. Although the Plaintiff failed to prove that she is entitled to a replacement of motor vehicle engine, there was a wrong committed by the Defendant when it did not discharge its duty of care in the manner it carried out its services on the radiator cap entitling the Plaintiff to Judgment for the legal injury or wrong. Having found that there was an infraction of the Plaintiff's legal right, it is my contemplation that the relief available to the Plaintiff is nominal damages. I

am fortified by the words of Lord Halsbury, L.C. in ***The Mediana***[11], where he expressed himself as follows: -

> ***"Nominal damages is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all yet gives you a right to the verdict or judgment because your legal right has been infringed."***

4.14 In light of what I have stated in the preceding paragraph, I find that the Plaintiff is only entitled to nominal damages. The sum of K10,000.00 in my view is sufficient with interest at the short term deposit rate from the date of Judgment and thereafter at the current bank rate until full settlement.

4.15 This finally brings me to the Defendant's Counter-Claim, for the sum of K178,000.00, being storage and security charges incurred when the Plaintiff refused to collect the car from the Defendant between the 26th of January, 2016, to the 24th of June, 2016. A Counter-Claim is in its nature a cross suit, an independent cause of action from that of the Plaintiff. The same expectation of the Plaintiff to prove its claim against the Defendant becomes the position and expectation of the Defendant to prove the Counter-Claim against the Plaintiff. The Defendant having failed to appear before Court to prosecute and prove its Counter-Claim against the Plaintiff means that the Defendant did not prove its Counter-Claim against the Plaintiff. The

Counter-Claim being an independent cause of action, it was therefore, not proved by the Defendant against the Plaintiff with any cogent evidence.

4.16 The learned authors of ***Phipson on Evidence***[2], in ***paragraph 6 – 06***, at ***page 151***, state the following regarding the burden of proof in civil cases: -

> ***"So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantively asserts the affirmative of the issue. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him. It is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons."***

4.17 Based on the foregoing, the Defendant having failed to adduce evidence on which it relies in support of its Counter-Claim for storage/security charges allegedly incurred, is not entitled to the relief sought.

## 5 CONCLUSION

5.1 The Plaintiff has partially succeeded in that she is only entitled to a refund of the hiring charges incurred by the Plaintiff at K550.00 per day from 6th December, 2015, to 26th January, 2016, being the date that the car went into the garage at Pilatus Engineering to when it was ready for collection. The total amount shall carry interest at the short term deposit rate from the date of Judgment and thereafter at the current bank rate until full settlement.

5.2 The Plaintiff is also entitled to reasonable compensation for mental distress, inconvenience and

the loss of use of her car at K10,000.00, with interest at the short term deposit rate from the date of Judgment and thereafter at the current bank rate until full settlement.

5.3 The Plaintiff has failed on a balance of probabilities to show that the Defendant was also liable for the second break down of her vehicle after one month of use since it had been initially repaired at Pilatus Engineering. Therefore, the Plaintiff's claims for the replacement of a BMW X5, 2000 model, motor vehicle engine and damages based on the said second break down of her vehicle are dismissed.

5.4 Regarding the Counter-Claim, the Defendant failed to discharge its burden of proof and accordingly, its claim is dismissed.

5.5 The Plaintiff having partially succeeded in her claims, costs are awarded to the Plaintiff to be taxed in default of agreement.

5.6 Leave to Appeal is granted.

**Delivered at Lusaka this 31st day of August, 2020.**

**P. K. YANGAILO**
**HIGH COURT JUDGE**