

## AFFIDAVIT

I, the undersigned,

**SEAN O'HAGAN**

(ID No. 490202 5065 080)

of 14 Robin Place, Robin Drive, Fourways, Sandton do hereby make oath and say:

- 1 I purchased a Toyota RAV 4 2.2D4D VX from Barloworld Toyota Sandton in February 2008 and took delivery of the vehicle on 22 February 2008. (See copy of registration certificate attached **Annexure A**);
- 2 Although the vehicle is registered in the name of my wife, Petronella Elizabeth O'Hagan, I am the *de facto* owner and the principal driver of the vehicle. I am authorised by my said wife to make this affidavit and to institute and conduct this action;
- 3 The vehicle has been well maintained and has had all the required services as and when they fell due. The last three services (45,000, 60,000 and 75,000) have been done by Halfway Toyota Fourways;
- 4 The last service done by Halfway Toyota was at 75,000km and was on Tuesday 16 August 2011. No faults were reported by myself or by Halfway Toyota when I collected the vehicle. (See **Annexure B**). It is interesting to note on this Invoice the printed statement "Warranty No : 3553173111849A Expiry Date : 21/02/2013";
- 5 On Saturday 17 September 2011 I left Fourways for the Kruger National Park where I stayed until Tuesday 27 September 2011. On 22 September 2011, I filled the vehicle with diesel for R380,00 at the Total petrol station in the Letaba Rest Camp. The vehicle's mileage was at 77508. At no stage during my stay in the Kruger National Park did I experience any trouble with the vehicle;
- 6 On Tuesday 27 September 2011 I left the Kruger National Park via the Orpen gate and drove to Hazyview where I filled up with diesel (43.14 litres of 50 ppm) at Total Hazyview F/C at 10:14 with the mileage at 78272. As I pulled away from this Total garage, on a slight uphill, I noticed that the vehicle was lacking power. This remained the case while driving in Hazyview and later in Nelspruit. I assumed that some impurities in the diesel were the cause of the problem. On the open road back to Fourways from Nelspruit, I experienced no problems at cruising speed;

7 On Wednesday 28 September or Thursday 29 September 2011 I telephoned Halfway Toyota to make an appointment to have the vehicle attended to. I was still of the opinion that it was a small problem, possibly dirty diesel or a minor adjustment and I continued to use the vehicle daily. On Saturday 1 October 2011, I drove the vehicle to Waterkloof Air Show in Pretoria and back with no obvious negative effects other than the fact that people driving behind me remarked on the fact that the vehicle was smoking from the exhaust. I still assumed this to be a minor problem;

8 On Monday 3 October 2011 I took the vehicle to Halfway Toyota and advised the Service Advisor, Kenneth Burger (KB), that the vehicle was lacking power and the turbo was slow to kick-in and that the vehicle was smoking excessively. I said at the time that I thought it may be due to dirty diesel. The mileage of the vehicle was 78895 (**Annexure C**). Later that afternoon I received a telephone call from KB to the effect that the vehicle was lacking compression and they believed that the engine would need to be replaced and their estimated cost, including labour, would be in the region of R67,000 and the work would take approximately two weeks. I asked for an email in confirmation and whether it was advisable for me to get a second opinion and was told that a senior technician or service manager (?) had already looked at the vehicle and agreed with the conclusion. I was asked for permission to proceed with "disassembly and investigation" "to determine the full extent of the work and parts required." (See **Annexure D**);

9 On Tuesday 4 October 2011:

**Annexure E**

I confirmed my permission to proceed with disassembly and investigation;

**Annexure F**

I requested a loan vehicle. This was refused and I subsequently accepted a cheap rental vehicle;

**Annexure G**

I advised Toyota SA that I intended holding them liable for payment of the repairs;

10 On Friday 7 October 2011:

**Annexure H**

Ms Tashnie Moodley of Customer Relations at Toyota SA requested details of the vehicle and of my complaint and my expectations of Toyota SA;

**Annexure I**

The required vehicle details were furnished by KB of Halfway Toyota;

**Annexure J**

I furnished brief details of my complaint and my expectations of Toyota SA;

11 On Monday 10 October 2011:

**Annexure K**

I requested a progress report as a week had elapsed with no information forthcoming;

**Annexure L**

I was informed by KB that he was awaiting "feedback from (his) engineers";

**Annexure M and N**

I received a email which confirmed that the "engine needs to be replaced" and that the "water pump is leaking and at this point seems to be the cause of the damage" and a quote for R73,351.64;

**Annexure O**

I replied by email as follows:

"It is very difficult for me to consider this quote as I have no means of ascertaining whether it is fair and reasonable or not. As it is probably not feasible to take the vehicle elsewhere for a second opinion, it would be appreciated if Toyota SA would inspect the vehicle and the quote and assure me that they agree that the proposed repairs are essential and the prices quoted are fair. Furthermore, I need to know as a matter of urgency whether Toyota SA is prepared to cover the costs of these repairs as I have previously requested.

"I can not accept your statement that a leak from the water pump is the cause of the damage. I first became aware of the loss of power on 27 September 2011 when I filled the vehicle with diesel in Hazyview with the mileage on 78272. I then drove the vehicle every day until it was delivered to your premises on Monday 3 October 2011. At no time did the vehicle overheat or the temperature gauge indicate anything other than normal."

**Annexure P**

I was informed by email:

"As per your request Toyota has sent through their FTM in order to assess our diagnostics and the quote. All was found to be in order and the water pump was confirmed as the most likely cause of the engine damage. The payment issue was also discussed and unfortunately there will be no Toyota assistance with regard to your engine repairs due to the vehicle being out of warranty."

12 On Wednesday 12 October 2011

**Annexure Q**

I received a telephone call from Mr Ricardo Niaken (RN) of Toyota SA Customer Care to the effect that Toyota SA would not assist me financially as the dealer (Halfway Toyota?) was not prepared to reduce costs at all and Toyota SA would therefore also not make any *ex gratia* payment. I requested this be confirmed in writing and received an email stating that Toyota SA “will not be able to assist with any cost assistance as (the) vehicle is 7 months out of the factory warranty” which was for 3 years or 100,000km.

It is because of the statement by RN that Halfway Toyota is included as a party to this dispute. I was of the opinion that my dispute was with Toyota SA only but inferred from the statement by RN that the decision not to grant me any relief was taken by the dealer, i.e. Halfway Toyota, and that Toyota SA were being guided by them.

**Annexure R**

I advised RN that I would be lodging a complaint with the Motor Industry Ombudsman;

**Annexure S**

I advised Halfway Toyota that I accepted the quote and instructed them to proceed with the repairs. Despite my acceptance, I reserved my rights to proceed against them and/or Toyota SA as I deemed fit and also advised them that I intended lodging a complaint with the Motor Industry Ombudsman;

**Annexure T**

I received confirmation that the parts were ordered and the work would commence.

13 On delivery of the vehicle, I will be obliged to pay the amount of R73,351.64 although I am firmly of the opinion that it is not just, fair or reasonable for the following reasons:

13.1 I have still not had a firm and unequivocal answer to what caused the total engine to fail. On 10 October it was said in Annexure M that the “water pump is leaking and at this point seems to be the cause of the damage” and on the same day in Annexure P that “the water pump was confirmed as the most likely cause of the engine damage.” (My underlining).

To my mind this is not a satisfactory explanation as to why a diesel engine in a relatively up-market and expensive motor vehicle should fail after

only 43 months and 78000 kms. More especially, I would not expect this from a Toyota vehicle which is claimed by the manufacturers worldwide to be very reliable!

In addition, AT NO STAGE did the vehicle overheat or the temperature gauge move out of the normal zone and, AT NO STAGE, was there any obvious signs of water leaking from the vehicle. When at home, the vehicle is kept in a closed, lock-up garage with a tiled floor that is kept scrupulously clean and any leaks would have been noticed.

In my opinion, the alleged leak from the water pump is deemed “most likely” by Toyota and its dealer as this is the most convenient for them as they are not prepared to consider the possibility that the engine failure was as a result of an inherent weakness or fault in the engine itself. What other “likely” causes are there?

Even if there was a leak from the water pump, why was there a total failure of the vehicle’s warning systems to prevent total engine failure?

- 13.2 As there was absolutely nothing that I could have done or could have done differently to avoid the damage, I do not believe that I should have to bear the excessive costs equal to 20% of the original cost of the vehicle. The fact that the time factor of the “factory warranty” of 3 years or 100,000 kms has expired and the warranty lapsed although the 100,000 kms are still far from complete is an indication that the major parts of the vehicle should last at least for a 100,000km too despite the passage of time. However, this technicality is being used as a defence of a vehicle that was not fit for the purpose for which it was manufactured – i.e. to travel distances of far more than 100,000 kms without major repairs. In this day and age of empowerment of the consumers as enshrined *inter alia* in the Consumer Protection Act, the individual consumer needs protection from the unscrupulous greed of the large corporates who hide behind convenient “factory warranties” designed to protect their inferior products from performing as reasonably expected by the consumers.

The recent recall of various Toyota products worldwide to correct inadequacies in their products was not limited by their “factory warranty”. The reason was that the size and extent of the problem put pressure on Toyota to act but, because this may be a single case of an inferior engine, they believe that they can renege on their obligations by invoking the “factory warranty.”

13.3 It is unconscionable, unfair and unreasonable that Toyota SA and/or Halfway Toyota should be enriched as a result of the failure of their product long before such failure can and should reasonably be expected and without any warning to the user of the impending failure.

SIGNED at SANDTON this 17<sup>th</sup> day of OCTOBER 2011

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Sean O'Hagan

SIGNED and SWORN to before me at SANDTON on this 17<sup>th</sup> day of OCTOBER 2011 by the Deponent who has acknowledged that he knows and understands the contents of this affidavit, that is it true and correct and that the oath is binding on his conscience.

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Commissioner of Oaths