

In the Supreme Court of South Africa  
In die Hooggeregshof van Suid-Afrika

( APPELLATE Provincial Division)  
Provinciale Afdeling)

Appeal in Civil Case  
Appel in Siviele Saak

THE AVIATION INSURANCE CO. C. S.A. LTD. Appellant,

versus

BURTON CONSTRUCTION (PTY) LTD. Respondent

Appellant's Attorney Webb & Newdigate Respondent's Attorney Siebert & Honey  
Prokureur vir Appellant Prokureur vir Respondent

Appellant's Advocate D. G. J. B. Respondent's Advocate V. P. H. J. S. L.  
Advokaat vir Appellant Advokaat vir Respondent

Set down for hearing on  
Op die rol geplaas vir verhoor op

Cases: Holmes, Janssen, R. v. B. de Villiers, J. A.  
et v. van Willemse H. J. A.

(W.I.D.) 9.45 am ————— 11.00 am  
11.15 am ————— 12.45 pm  
2.15 pm ————— 3.30 pm

The Court dismisses the said  
appeal with costs, including those  
costs occasioned by the employment  
of two counsel

Bills taxed—Kosterekenings getakseer

Writ issued  
Lasbrief uitgereik

Date and initials  
Datum en paraaf

Date Datum	Amount Bedrag	Initials Paraaf
10/9/76		

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between -

THE AVIATION INSURANCE COMPANY  
OF AFRICA LIMITED

Appellant

and

BURTON CONSTRUCTION (PROPRIETARY)  
LIMITED

Respondent

Coram: HOLMES, JANSEN, RABIE, DE VILLIERS, JJ.A.,  
et VAN WINSEN, A.J.A.

Heard: 26 August 1976

Delivered: 10 September 1976

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J U D G M E N T

HOLMES, J.A., -

In the Witwatersrand Local Division the present respondent successfully sued the appellant for R49 421,36 under a policy of insurance.

/The .....

The respondent company owned a helicopter and insured it with the appellant. It was damaged in a heavy landing near Davel, in the Eastern Transvaal, on the morning of 31 July, 1973. At the time it was being piloted by Mr N. Stewart-Richardson, a qualified helicopter pilot. He was the only pilot employed by the respondent.

One of the grounds upon which the appellant repudiated liability (and it is the only ground pursued in this appeal) was that the respondent breached a warranty by failing to comply with the provisions of the Air Navigation Regulations.

The policy, which covered loss of or damage to the helicopter, was subject to the following warranty by the insured: (it is referred to in paragraph 1 of the plea) -

"WARRANTED THAT

1. The insured will comply with all air navigation and airworthiness orders and

/requirements .....

requirements issued by any competent authority and will take all reasonable steps to ensure that such orders and requirements are complied with by the insured's agent(s) and employees and that the aircraft shall be airworthy at the commencement of each flight."

The appellant in paragraph 7 of its plea alleged that the insured had breached this warranty in the following manner: (sub paragraph (a), (b) and (c) are common cause) -

"7. (a) In terms of the Air Navigation Regulations the Commissioner for Civil Aviation, being a competent authority in terms of the warranty set out in paragraph 1 above, imposed certain operating limitations on the said helicopter ZS HDU.

(b) In particular the helicopter was limited to operation under Visual Flight Rules (VFR) in non-icing conditions.

(c) For operation under VFR a daylight flight shall be so conducted that

the aircraft is flown with visual reference to the ground and in conditions of forward visibility of at least one and a half kilometres.

- (d) During the latter part of its flight on 31st July, 1973, and prior to its landing, the said helicopter was flown in conditions other than under VFR as aforesaid, and in conditions where icing was likely to occur. Accordingly the Plaintiff did not comply with the air navigation requirements issued by competent authority.

- (e) In the premises the Plaintiff has breached the warranty set out in paragraph 1 hereof and the Defendant is therefore not liable to indemnify the Plaintiff in terms of the said insurance policy or at all."

The respondent asked for further particulars of the acts and omissions on the part of the "Plaintiff itself" which were alleged to constitute a failure by it to comply with the air navigation requirements.

/The .....

The reply was as follows -

"(iii) The Plaintiff's helicopter pilot, Mr N. Stewart-Richardson, was charged with the duty of complying with the air navigation requirements. His failure so to comply, as set out in paragraph 7 (d) of the Plea, constitutes a breach of warranty by the Plaintiff itself."

Two issues arose on this plea. First, did Mr Stewart-Richardson fly in breach of the regulations, as alleged? Secondly, if he did so, was his breach a breach by the insured, in terms of the warranty?

The learned trial Judge found in favour of the appellant on the first issue. He found, on the probabilities, that during the descent of the aircraft the pilot did not maintain the forward visibility of 1-1/2 kilometres required by the Visual Flight Rules (V.F.R.)

On the second issue the learned trial Judge held that Mr Stewart-Richardson's position was no more than that

/of .....

of -

~~"a delegate to whom certain duties had been~~  
entrusted, not that of a person charged with  
the management of the plaintiff's affairs".

The first part of the warranty related, he  
held,

"to personal obligations of the plaintiff  
itself",

and the pilot's failure to observe V.F.R. requirements  
while landing the helicopter was not the failure of the  
plaintiff in terms of the warranty.

On this ground, therefore, the appellant's  
defence failed.

In the result, the appeal turns on the inter=  
pretation of the warranty aforementioned.

It will be noted that the first part of the  
warranty obliges the insured to comply with all air naviga=  
tion and airworthiness orders and requirements issued by

/any .....

any competent authority; whereas the second part obliges  
~~the insured to take all reasonable steps to ensure that~~  
such orders and requirements are complied with by the  
insured's agent(s) and employees, and that the aircraft  
shall be airworthy at the commencement of each flight.

The conclusion of O'Donovan, A.J., was that  
the first part of the warranty related "to personal  
obligations of the plaintiff ~~itself~~"; and that the pilot's  
failure was not "the failure of the plaintiff".

In this Court the contention on behalf of the  
appellant was, basically, that vicarious~~liability~~ was not  
in issue; that the warranty imposed an obligation on the  
respondent company; that a company, as an artificial person,  
can act only through human agents; that in certain circum=  
stances the acts of its human agents are attributed to the  
company itself, and the company is held to be directly  
and not vicariously liable for those acts; that in most  
cases it is the acts of the board of directors or of the

/managing .....



managing director which are so attributed to the company, but that these are not the only agents whose acts are ~~to~~ to be attributed to the company itself; that the question whether the acts of a servant are those of the company must be answered by reference to the position of the servant, the nature of the act and the circumstances of the case; that in the present case, in so far as the proper flying of the helicopter was concerned, the duty of compliance with navigational regulations could not be carried out by the directors, but only by the pilot; that his was the directing mind of the company in this field of its activity; that there was no question of delegation; that he was the person who, for the purposes of the first part of the warranty, had the function of complying with the regulations for the company; that his failure was the failure of the insured company; and that the warranty was thereby breached by the company. This was the argument.

To decide the issue, one must in the first instance look at the policy of insurance. It is stated

/to be .....

to be an aircraft policy. It is basically on a standard printed form. ~~The form is not limited to~~ an insured which is a company, for, in section II which deals with third party liability, it provides that this cover shall not extend to indemnify the insured in respect of claims by "Any member of the household or family of the Insured". And the same exception is later made in relation to Section III, in reference to Legal Liability to Passengers.

It will be noted that the warranty has two distinct parts. The subject of navigational orders and requirements is common to both parts; but the obligation of compliance therewith differs in the two parts. The first obligation is absolute: the second requires only the taking of "all reasonable steps". The two are as different as chalk is from cheese. What is the reason for this difference? When does the first part apply and when the second? If the insured were a natural person, the position would be clear: if he

/were .....

were acting alone whether as pilot or otherwise, he would personally have to comply with all navigational orders and requirements: an absolute obligation. But if he employed an agent or servant, whether as pilot or otherwise, he would merely have to take all reasonable steps to ensure that he complied with the navigational orders and requirements.

Knowing this, the insurer used the same printed form for the insurance of the respondent company's helicopter. Is there any reason to suppose that the warranty should be interpreted differently on that account? Why should the insurer be in a better position merely because the insured is a company? In particular, if the company employs a pilot to fly the helicopter, why cannot the second part of the warranty be applicable, namely that the company must take all reasonable steps to ensure the pilot's compliance with the air navigational regulations? How does it do

this? Basically by employing a qualified and responsible pilot. Support is lent to this view by the provision

/in the .....

in the policy that the insured helicopter's pilots (other than Mr N. Stewart-Richardson, whose qualifications appear to have been accepted by the insurer) should be -

"commercially licensed helicopter pilots approved by the Insured with a minimum of 1 000 helicopter flying hours of which 100 hours have been in command of turbine types".

Counsel cited authorities indicating that, for example, (a) when a board of directors, or someone of standing such as a managing director, thinks and acts, that is the company itself thinking or acting; but (b) when a humble employee does this, he does it on behalf of the company. Counsel argued that the pilot, albeit an employee of the respondent civil engineering construction company, fell within (a), because he was in charge of flying the helicopter in the air. Considering the matter objectively, on the facts of this case I am unpersuaded

/that .....

that board-room and flight-deck can be thus identified.

As O'Donovan, A.J., rightly said of the pilot's function,

"It was that of a delegate, to whom certain duties had been entrusted, not that of a person charged with the

management of the plaintiff's affairs". In my view

the pilot, in the circumstances of the present case, was

an agent or employee of the company within the language

of the second part of the warranty. Accordingly, the

company was required merely to take all reasonable steps

to ensure that he would comply with the navigational

regulations.

The appellant knew, when insuring the helicopter

of a company, that the company itself could not fly and

would engage a pilot; and it must have contemplated that

the company would carry out the warranty if it complied

with the second part thereof, namely, to take all reasonable

steps to ensure that the navigational regulations are

complied with by its pilot.

Counsel for the appellant

/rightly .....

rightly accepted that Mr Stewart-Richardson was a

~~properly qualified and competent pilot, and there is~~

force in the following submission by counsel for the

respondent -

What more could the Burton Construction  
have done? They trusted Stewart-  
Richardson; they had the judgment of  
Boles, a most experienced pilot, as to  
Stewart-Richardson's competence;  
they knew that Stewart-Richardson had  
successfully passed all tests required on

/the .....

the helicopter and on the Allison engine;  
they knew that he had successfully passed  
a test in navigation in the Republic;  
they knew he was qualified to fly a helicopter in South Africa; and to be on the safe side they had him re-tested by Boles. They could have done nothing more. They had taken all reasonable steps to ensure that their employee, the pilot, would comply with the Air Navigation Regulations.

To sum up so far, we hold against the contention, on behalf of the appellant, to the effect that the pilot and the insured company are to be identified for the purposes of the obligation in the first part of the warranty.

Counsel went on to submit, in the alternative, that the warranty placed on the insured an unqualified duty of compliance. Substantially, this argument was that the insured's duty was not merely to take precautions, but

/actually .....

actually to comply with air navigation regulations;  
and that it could not evade the consequences of non-compliance by a delegation of the duty. In my view that is not what the second part of the warranty says; and it is the second part which is applicable in the circumstances of this case which concerns an employee of the insured in relation to navigational regulations. This second part of the warranty contemplates delegation. The company's obligation under this part is to take all reasonable steps to ensure that its employee will comply with such regulations. If the company does this, the warranty is not breached. To hold otherwise would be to require the company to guarantee compliance by its employee - an interpretation at variance with its expressed duty, in the second half of the warranty, to "take all reasonable steps" to ensure such compliance.

/I have .....



I have only to add that it cannot be said that  
in the present case the first part of the warranty is  
rendered inoperative by the views expressed above.  
Counsel handed in a copy of the Air Navigation Regulations.  
They are contained in Government Notice No. R1779 dated  
15 November 1963, as amended. They comprise a formidable,  
though doubtless necessary, catalogue of do's and dont's.  
A perusal of them reveals that there are several regulations  
which cast an obligation on the owner, and not the pilot.  
For example, regulation 4.6(1) obliges the owner of a

/registered .....

registered aircraft to notify the Commissioner of Civil Aviation of any change of ownership. Non-compliance could be a breach under the first part of the warranty.

On the other hand, the adoption of the contentions on behalf of the appellant would render the second part of the warranty pointless and of no account. O'Donovan, A.J., pointed this out, referring to the obligations under the two parts of the warranty as follows -

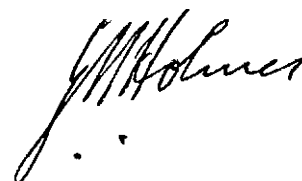
"If an element of vicarious responsibility were to be imported into the first of these obligations, this would have the effect of imposing on the plaintiff the burden of a guarantee of compliance by its employees with navigation orders and requirements, and the purpose of the second obligation would fall away. Conversely, it appears to be inconsistent to require the plaintiff to take reasonable precautions in the selection of a pilot for the performance of the duties entrusted to him, and then, if it does so, to deprive the plaintiff of the benefit of the policy if the pilot does not properly carry out such duties."

/Lastly .....

Lastly, although counsel sought helpfully to justify or illustrate their submissions by reference to decided cases, I have not found among them one which is quite the same as this one, in which the warranty requiring interpretation has a curious dichotomy.

To sum up so far, I agree with O'Donovan, A.J., that, on a proper construction of the warranty, it cannot be said that the respondent company was in breach of it.

In the result, the appeal is dismissed with costs, including those occasioned by the employment of two counsel.




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G.N. HOLMES

JUDGE OF APPEAL

JANSEN, J.A. )  
 RABIE, J.A. )  
 DE VILLIERS, J.A. ) *All concur*  
 VAN WINSEN, A.J.A. )