CASE NO. 412/1995

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

WELKOM MUNICIPALITY Appellant

and

J P MASUREIK & H G HERMAN 1st Respondents t/a LOTUS CORPORATION

K J DAVIDSON 2nd Respondent

CORAM: Van Heerden, E M Grosskopf, Harms, Marais et Scott JJA

HEARD: 6 March 1997

DELIVERED Orders made on 6 March 1997; reasons for judgment furnished on 14 March 1997

REASONS FOR JUDGMENT

MARAIS JA/

MARAIS JA:

At the conclusion of the argument in this appeal the court allowed the appeal, ordered first respondents (plaintiffs in the Court a quo) to pay appellant's (defendant in the Court a quo) costs of appeal, including the costs of two counsel, ordered appellant to pay second respondent's (the third party in the Court a quo) costs of appeal, and ordered that the orders of the Court a quo be set aside and substituted by the following orders:

> "Plaintiffs' claims are dismissed.
>
> Plaintiffs are ordered to pay Defendant's costs including the costs of two counsel.
>
> Defendant is ordered to pay the costs of the third party."

It was intimated that written reasons would be given in due course.

These are the reasons.

The judgment of the Court a quo (Hattingh J) is reported

(Masureik (t/a Lotus Corporation)v Welkom Municipality 1995

(4) SA 745 (O)) and it is consequently unnecessary to burden these reasons for judgment with a relatively detailed exposition of the issues and the evidence. I find it convenient to refer to the parties as they were referred to in the court of first instance.

Plaintiffs had sought to recover from defendant, the owner and operator of the Welkom Aerodrome, damages arising out of physical damage caused to an aircraft allegedly owned by them. One of the aircraft's two engines failed while it was taking off, causing it to veer off the runway and career at high speed for some 350 metres along the area adjacent to the runway before its nosewheel struck the further edge of a substantial depression running at a right angle to the runway. The depression was variously described in the evidence as "an unused taxiway", a taxiway", and, somewhat pejoratively, "a

ditch". The mishap occurred at a point 27,33 meters from the edge of the runway which was itself 18 metres wide. The ensuing collapse of the nosewheel led to the nose of the aircraft hitting the ground and the causing of yet further damage to the aircraft.

The reason why the defendant's appeal was upheld was because plaintiffs had failed to prove that defendant had been negligent in any of the respects alleged in the pleadings. The cause of action invoked was not based upon any breach of statutory duty or failure to comply with conditions attaching to the public aerodrome licence issued to defendant by the Commissioner for Civil Aviation in terms of the Aerodrome Regulations, 1982 (the "Aerodrome Regulations") read with sec 22 of the Aviation Act no 74 of 1962. It was grounded squarely upon allegations of culpa in the classic Aquilian sense. (See the pleading quoted at 748 E - H of the reported

judgment.)

The Court a quo concluded that plaintiffs had proved upon a balance of probability that defendant had been negligent and that its negligence was the direct cause of the damage to the aircraft, The learned judge's reasoning, reduced to its essentials, was this, (I have sometimes amplified the references to the documents to which he had regard.) The Chicago Convention ("the Convention") had become part of South African municipal law. The International Civil Aviation Organization ("ICAO"), established by the Convention, is mandated to adopt "international standards and recommended practices and procedures" relating inetr alia to the "characteristics of airport and landing areas", and to revise them from time to time. These are issued as annexes to the Convention. They are in general applied by all member States each of-which had undertaken to collaborate in

securing (he highest practicable degree of uniformity in regulations, standards, procedures and organization in relation to aircraft, personnel, airways, and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation. A State which finds it impracticable to comply in all respects with any such international standard or procedure has to notify the ICAO of the differences between its own practice and the international standard. The ICAO issued annex 14 ("the annex") which deals with aerodromes. There is a reference in it to "runway strips" which are not defined as such but it is said that "(a) runway and any associated stopways shall be included in a strip". There is also a

recommendation in the annex that at an aerodrome such as that which

exists at Welkom such a strip should extend laterally to a distance of

at least 75 metres from the centre line of the runway and its extended

centre line throughout the length of the strip. There is an ancillary recommendation that an object situated on a runway strip which may endanger aeroplanes should be regarded as an obstacle and should, as far as practicable, be removed, and that no fixed object, other than visual aids required for air navigation purposes and satisfying relevant frangibility requirements, should be permitted on a runway strip within 60 metres of the runway centre line. There is a further reference in the annex to "runway shoulders" which again are not defined as such. Instead, "guidance on characteristics and treatment" of them is given in an attachment to the annex and in "the Aerodrome Design Manual, Part 2". Under the heading "Recommendation" it is said in para 3.2.1 of the annex that "Runway shoulders should be provided for a runway where the code letter is D or E and the runway width is less than 60 m". The reference to code letter D or E is presumably a reference to

para 3.1.9 of the annex which deals with the width of runways and recommends that such width should be not less than the appropriate dimension specified in a following tabulation from which it appears that the recommended width of a runway where the code letter is D or E should be not less than 45 metres. There is a recommendation in para 3.2.2 that runway shoulders abutting the runway should be prepared or constructed so as to be capable, in the event of an aircraft running off the runway, of supporting the aircraft without inducing structural damage to the aeroplane, and that the shoulders should extend symmetrically on each side of the runway so that the over-all width of the runway and its shoulders is not less than 60 metres. The learned judge's own "research" revealed that the Republic of South Africa never notified the ICAO that it found it impracticable to comply with these recommendations and that its own practice in this

regard differed from that recommended in the annex.

The Aerodrome Regulations make provision for the licensing of aerodromes for public use and such a licence remains valid for only as long as the requirements prescribed by the regulations are complied with. Apart from other provisions aimed at providing safe landing and take-off facilities for aircraft, the regulations contemplate the provision of "strips" defined as a "defined area, including the runway and stopway, if provided, intended (inter alia) to reduce the risk of damage to aircraft running off a runway". However, the regulations are silent on what the dimensions or nature of these strips are to be - an omission much deplored by the learned judge. Reference was made by the learned judge to exhibit "J", a document purporting to emanate from the Department of Transport: Division of Civil Aviation, in which it is recommended to aerodrome

operators that runways "must preferably be wider than 15 m" and that "cleared strips" be provided on either side of the runway. It provides further: "These strips do not form part of the actual landing terrain, but are designed as safety areas in the event of an aircraft swinging off the runway. The strips do not require the same degree of maintenance or care, but must be kept free of such obstructions as holes, furrows, ant hills, stones, etc. There must be no banks where the runway and the cleared strips merge". Attached to the document were two drawings entitled respectively "Runway Markings" and "Approach Surface Slope and Areas". Although the learned judge made no point of it, ex facie these drawings the total width of the runway and the abutting "cleared areas" as they are styled in one of the drawings, and "runway strips" as they are styled in the other, is 150 metres.

Remarking that it was not necessary to decide whether a

contravention of the Aerodrome Regulations per se would give rise to a cause of action for damages without proof of negligence, the learned judge observed that "a breach of a statutory duty will frequently be strong evidence of negligence". He thereupon proceeded to consider whether it had been proved that defendant had acted negligently in one or more of the respects alleged in the pleadings. After reviewing a number of cases in which damage had been caused to aircraft by reason of conditions existing at aerodromes, he proceeded to say what he considered "the liability, responsibility and duty of the owner and licensee of an aerodrome towards a pilot and his aircraft using that aerodrome" to be. Again, I shall confine this résumé to the essential elements in the reasoning of the learned judge. He proceeded thus.

A reasonable aerodrome operator would have foreseen the possibility that an aircraft might swing off the runway while taking off or

landing, due to circumstances beyond the pilot's control. A reasonable man would have taken measures to guard against that. Exhibit "J" showed that the Department of Civil Aviation recognised "those occurrences by asserting that cleared strips on either side of the runway must be provided" to serve as "safety areas in case of an aircraft swinging off the runway". While exhibit "J" did not require the strips to be maintained with the same degree of care as the runway, they had to be kept free of holes, furrows, anthills, stones, etc and there were to be no banks where the runway and the strips merge. The Aerodrome Regulations also recognised the possibility by referring to a strip as a designated area "to reduce the risk of danger

to aircraft running off a runway". ICAO recommended practices

regarding runway shoulders showed that it too recognised this risk for

it recommended that runway shoulders should extend, symmetrically

on each side of the runway, so that the overall width of the runway and its shoulders is not less that 60 metres and "above all" that the shoulders should be prepared or constructed so as to be capable, in the event of an aeroplane running off the runway, of supporting the aeroplane without inducing structural damage to the aeroplane. A landing area (terrain) is defined in the Aerodrome Regulations as that part of the movement area intended for the landing and take-off of aircraft and those regulations oblige the aerodrome licensee to ensure that unserviceable areas on the landing terrain are properly marked, and that the aerodrome is maintained in a serviceable condition and kept free of obstructions.

As licensee of the aerodrome, defendant was obliged to take all reasonable steps to maintain "the landing area in a safe condition by providing strips on each side of the runway and its

extended centre line throughout the length of the strip, which strip should have been prepared or constructed so as to be capable, in the event of an aircraft running off the runway, of supporting the aircraft without inducing structural damage to it". I observe here that this amounted to equating the "runway shoulders" of which annex 14 speaks with the "runway strips" of which it also speaks, and also with both the "cleared strips" referred to in exhibit "J" and the "strip" referred to in the Aerodrome Regulations. This is something to which I shall return.

The learned judge then addressed himself to what I consider to be the critical question in the case: how wide would a reasonable aerodrome licensee have considered such strips should be? He did not specifically pose the question in that form but I think it fair to conclude that it was implicit in his approach to the matter. He said

this:

> "Apart from ICAO's recommendations nothing is said in the Aerodrome Regulations of the width of the strips. That is left to inference as I have already alluded to. In this specific instance the point of impact, in the ditch, was 27,33 metres from the edge of the runway (36,33 metres from the centre line of the runway). Defendant was obliged to ensure that the aerodrome as such was maintained in a serviceable condition and kept free of impediments such as the ditch. To permit the continuation of a ditch situated 18,33 metres from the centre line of the runway, clearly constituted negligence".

On the question of how defendant had, or should have, assessed the risk of harm actually eventuating, the learned judge said:

> "On the reality of the risk of harm eventuating, I have already emphasised that the reasonable man in defendant's position would have accepted that the observance of the safety precautions I have alluded to (those prescribed in the regulations, and those recommended by the DCA) were necessary to ensure safe flying in all its phases. It is trite that regulations, being part of the law, are presumed to be known. That particularly applies to persons who come into contact with them in their ordinary vocations. Here the defendant, as licensee of the aerodrome, was in law bound to know the

regulations and to comply with them (cf R v Adcock 1948 (2) SA 818 (c) at 821)."

In his commendable zeal to reach a correct and just conclusion, the learned judge regrettably misdirected himself in a number of important respects. As he himself complained, his attention was not directed by counsel to the Convention, or any ICAO publications, or to annex 14 thereto. This material was the fruit of what the learned judge described as "my own, but very time-consuming research". He appears to have regarded it as law to which he was entitled to have regard on the basis that it amounted to international law which had been adopted as municipal law in South Africa. In so doing, he erred. While the Convention itself has been adopted and enacted as if it were domestic legislation (sec 1 of the Aviation Amendment Act no 42 of 1947), any recommendations which

may be made pursuant to it by ICAO are not automatically, and without more, invested with the status of a municipal law binding upon the citizenry of South Africa. Apart from the fact that they are no more than recommendations, the Convention itself does not impose upon parties to it an absolute obligation to implement them. Article 38 specifically recognises that if a State "finds it impracticable to comply in all respects with any such international practice or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, or ..... deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard", it shall be free to depart from them. The fact that in such event it is required to notify the ICAO of the divergence, but fails to do so, does not have the effect of conferring upon the

recommendation concerned the status of a municipal law. I should add that whether or not South Africa did or did not fail to do so is a question of fact upon which there was no evidence before the Court a quo, and for reasons too obvious to require enumeration, the learned judge was not entitled to enquire into this issue of fact after reserving judgment and without any reference to the parties, and then to decide it. Cf Kausa v Minister of Home Affairs and Others 1996 (4) SA 965 (NmSC) 973 H - 974 C.

To revert to the topic of the status of annex 14, sec 22A of the Aviation Act, no 74 of 1962 makes it quite plain that unless an "international aviation standard" (defined as meaning "any aviation standard or recommended practice or procedure adopted by the International Civil Aviation Organization for the purposes of article 37 of the Convention") is incorporated in the regulations by Ministerial

notice in the Gazette, it will not be deemed to be a regulation made as provided for in sec 22, and that, even if it is so incorporated, it will only come into operation on a date specified in the notice, but not before the expiry of 30 days after the date of publication of the notice. Manifestly, it will not acquire the status of a municipal law unless those things be done. Nothing was placed before the learned judge, or for that matter before us, to show that annex 14 was so incorporated. To the extent therefore that he relied upon the recommendation in annex 14 for the proposition that a runway such as this should be equipped with runway strips extending laterally to a distance of at least 75 metres on each side of the centre line of the runway and its extended centre line throughout the length of the strip, or for the propositions that "runway shoulders should extend, symmetrically on each side of the runway, so that the overall width of

the runway and its shoulders is not less than 60 metres", and that such shoulders should be prepared or constructed so as to be capable, in the event of an aeroplane running off the runway, of supporting the aeroplane without inducing structural damage to the aeroplane, the learned judge misdirected himself. I might add that it is far from clear that these two concepts (runway strips and runway shoulders) are interchangeable and can be equated. It appears that which of them is recommended in any given case by ICAO depends upon the code letter of the particular aerodrome. No evidence was led to show what code letter was applicable to Welkom Aerodrome. Indeed, the only evidence placed before the Court in that regard was that of Kotze who said that he did not know into which category of aerodrome it fell but that it was "'n lae kategorie".

As for exhibit "J", its origin (other than that it purported

to emanate from the Department of Transport (Civil Aviation)), status in law, and applicability were left shrouded in mystery. It was dated 1977. It is an amalgam of suggestions, recommendations, and admonitions. No evidence was led to show that a copy of exhibit "J" had been sent to those in charge of the Welkom aerodrome, or that they were aware, or should have been aware, of its existence. Nor was any person competent to give evidence as to its applicability at the time of the accident, called to give evidence. The learned judge's reliance upon it was therefore also misplaced.

What had to be proved by plaintiffs was that a depression of the kind which existed at this particular aerodrome at the place where this aircraft came to grief was one which it was negligent to allow to exist. It will be recalled that when the aircraft encountered the depression it was 27,33 metres from the edge of the runway. On

the face of it that is a not inconsiderable distance from the edge of the runway. It was 36,33 metres from the centre line of the runway. Indeed, if it was the recommendation contained in the ICAO document that the overall width of the runway and its shoulders should not be less than 60 metres which should have been adhered to, the depression would not have fallen within the parameters of a runway and shoulders constructed so as to provide a width of 60 metres. It would have been 6,33 metres beyond the edge of such a 60 metre wide area.

It requires to be emphasised that there is no suggestion in the regulations that shoulders or strips adjoining a runway should be such as to eliminate entirely any risk of damage to an aircraft which involuntarily leaves the runway while landing or taking off. The Aerodrome Regulations define a "strip" as intended inter alia "to reduce (my emphasis) the risk of damage to aircraft running off a

runway".

There was a dearth of evidence from anyone competent to give it as to what a reasonable aerodrome operator at an aerodrome of this kind would, or should, regard as a sufficiently wide and reasonably level cleared area adjacent to the runway in question to offset the risk of injury to persons, or damage to an aircraft, attendant upon its involuntary departure from the runway while landing or taking off. I should not be understood to be saying that it was not negligent to allow a depression of this kind to exist 27,33 metres from the edge of this runway. It may have been. What I am saying, is that it is certainly not self-evident that it was negligent, and that plaintiffs failed to place sufficient admissible evidence before the court to enable it to justify concluding that it was indeed negligent. The consequence is that plaintiffs' claims should not have been upheld. It

is thus irrelevant whether or not there was any contributory negligence on the part of either of the pilots and it is unnecessary to review the findings of the Court a quo in that regard.

I should mention that the subsequent striking of a rock was rightly held to be causally irrelevant by the learned judge. It was also not proved that permitting the rock to be where it was, was an act of negligence, for the same reasons that it was not proved that to have permitted the existence of a depression at the point where the aircraft encountered it, was an act of negligence.

An alleged negligent failure to warn of the existence of the depression was also not made out. Only if it was known or foreseen that permitting the existence of the depression that distance away from the edge of the runway might cause damage to persons or aircraft, would a duty to warn arise. As 1 have said, it was not proved

that such was the case. Moreover, a failure to warn had no causal relevance in this case because the presence of the aircraft at the point where it came to grief was involuntary.

The overall conclusion that no negligence on the part of defendant had been proved, rendered it unnecessary to decide whether or not plaintiffs had proved that they were the owners of the aircraft at the time - a matter which was seriously put in issue. The evidence put forward in support of the allegation was perfunctory and it is questionable whether the doubt cast upon the assertion of ownership by the evidence given during cross-examination was dispelled upon a balance of probability.

Counsel for the parties informed the Court that if plaintiffs' claim were to fail, it was agreed that defendant would pay the costs of the third party both in the Court a quo and on appeal.

Counsel for plaintiffs conceded that in the event of the appeal being upheld, defendant should be awarded the costs of two counsel in both Courts.

For these reasons, this Court made the orders which it did.

R M MARIAS
JUDGE OF APPEAL

Van Heerden JA)
EMGrosskopf JA)Concur
Harms JA) Scott JA)