REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

26 May 2017
DATE

SIGNATURE

CASE NO: 18553/2014

In the matter between:

GLOBAL AVIATION INVESTMENTS (PTY) LTD	**1ST APPLICANT**
GLOBAL AVIATION INVESTMENTS GROUP (BVI) LTD	**2ND APPLICANT**
GLOBAL AVIATION OPERATIONS (PTY) LTD	**3RD APPLICANT**

And

INGOSSTRAKH	**RESPONDENT**

J U D G M E N T

VICTOR J:

[1] On 13 November 2012 the plaintiff's MD82 aircraft with registration number ZS-TOG and Aircraft Manager Serial Number 49905 sustained damage during a rejected take-off at OR Tambo International Airport when a warning light in the cockpit showed a landing gear anomaly. Both engines ingested non organic foreign material while under full power resulting in damage to the aircraft itself and to the left and right hand side engines. The aircraft had to be removed from the runway and this resulted in a closure of the runway for 5 hours.

[2] The questions for determination include whether on a proper interpretation of the Airline Hull All Risk Insurance Policy Number BO509AD231523 policy, constructive total loss (CTL) was covered and whether it was at the applicant's election to declare the loss a CTL and what the respondents' obligations were in terms of the policy

[3] The deponent on behalf of the applicant is Mr Jonathan Rosenzweig and he sets out a very detailed history. He was responsible for the aircraft. He holds a commercial pilot's license and is a designated flight examiner to test pilot trainees training. He also gives a very detailed exposition of his experience in the field and since 2001 he has been employed by Global Airways Group operating at O.R Tambo International Airport. The applicant relies on clauses in the insurance policy for the damage suffered by it.

[4] Section 1 deals with 'Hull Coverage' and 'Cover' is defined as follows:

> 'This Section covers the Insured Property being Aircraft owned, operated or used by or on behalf of the insured for which the insured is responsible as per the Schedule of the Aircraft against all risks of loss or damage whilst in flight, taxiing or on the ground, howsoever occasioned, except as hereinafter excluded, sustained during the Period of Insurance'.

> Clause '3(b) Under the legend" Agreed Value - Total Loss:
> A total loss may be detained under this insurance at the option of the Insured, in the event that the cost of the repair of the damage together with the cost of salvage and/or transport from the place of accident to the place of repair and return to service be estimated at 75% of the agreed value. In such event the Insurers will pay the agreed value of the Aircraft. However any increase in the agreed value of the Aircraft concerned, as provided in clause 11 of this section, shall not be taken into account in the application of this provision.
> This provision shall not however preclude the declaration of a total loss following the agreement between the insurers and the insured in the event that such costs be estimated at less than seventy five percent of the agreed value, in such event the insurers will pay the agreed value of the aircraft.
> However any increase in the agreed value of the aircraft concerned, as provided for in clause 11 of this section, shall not be taken into account.'

[5] Clause 8 of Section 2 defines that the policy would be governed by the Applicant's domicile

[6] One month from 13 November 2012 after the damage was incurred, the third applicant submitted a full aircraft and engine repair costing to Airclaims and the quotation amounted to US$2 088 696.80 with a statement that only visible damage was quoted for. Airclaims is a

company appointed by the respondent to assess the damage to the aircraft.

[7] This quote was obtained from Global Aviation Maintenance (Pty) Ltd (GAM) an associated company of the applicant. The quotation exceeded the constructive total loss (the CTL) threshold, as referred to in clause 3(b) of the policy.

[8] The applicant also contends that GAM is the approved maintence supplier approved by the South African Civil Aviation Authority (SACAA). GAM was the only Aviation Maintenance Organisation (AMO) which had access to technical data supplied by Boeing. It also had the requisite B category licence with the MD-80 type rating issued by SACCA which allowed it to carry out maintenance.

[9] The first applicant in its founding affidavit sets out that it was of the view that Global Aviation Maintenance was really the only service provider who could repair this kind of aircraft in accordance with the manufacturer's recommendations. It alleged that Airclaims either deliberately or mistakenly suggested companies that were not competent to repair the aircraft to service level. These included Nevergreen Aircraft Industries, Star Air Maintenance (Pty) Limited and Jetworxs and the contention is that Global Aviation Maintenance (Pty) Limited, a related company, was the only company in South Africa that could repair this aircraft.

[10] The respondent on the other hand had also included a quotation which demonstrated that the aircraft was not a CTL and that it could be repaired for half the amount and therefore asserted that the provisions of clause 3(b) did not apply. Reference was made to the Civil Aviation Regulations setting out in great detail what is required of a service provider that could repair the aircraft in question and contended that no other company other than an entity that holds a category B license could repair the aircraft.

Interpretation of Clause 3(b)

[11] The applicant relied on a number of cases and made the submission that once an aircraft was damaged the option to have it declared CTL was really at the option of the insured. The applicant also submitted that the cost estimate could be made only by an entity selected by the insured. In the result the applicants' case involved a proper interpretation of clause 3(b). The applicants relied on the word 'may' in line 1 of clause 3(b). I deal with the first part of that clause where the words:

> 'A total loss may be declared under this insurance at the option of the insured, in the event that the cost of the repair of the damage together with the cost of salvage and or transfer from the place of the accident to the place of repair be estimated at seventy five percent or more of the value.'

[12] In my view a strict construction of those words does not suggest that it is only the insured that can elect the cost of such repair. This clause only gives the applicant a right to declare and this is captured by the words “may be declared”. This does not preclude the respondent from also providing estimates of what the cost of repair would be. It is only relevant to the situation where both the insured and the insurer are *ad idem* that the cost is seventy five percent or more than the agreed value, bearing in mind that the agreed value in this matter was $2 500 000.

[13] The applicant contends that it was only GAM who could provide a quote. This must be compared with the fact that by the time the insurer, that is the respondent, obtained a quote its service provider had the necessary B category accreditation. It matters not whether the accreditation is obtained after the insured event (that is the damage in this instance), it is acceptable that indeed even 1 year after the collision that an entity with a B category accreditation can made such an assessment.

[14] The applicant also sought to argue that the entity appointed by the respondent did not even inspect the aircraft. The affidavits are very clear on behalf of the first respondent, the aircraft certainly was inspected. On a proper construction of the affidavit and the quote, it certainly was inspected. Therefore it was not simply an academic exercise.

[15] The applicants further contend that based on a case of *Kliptown Clothing Industries (Pty) Ltd v Marine & Trade Insurance Co of SA Ltd*

1961 (1) SA 103 (A) where there is possible ambiguity, in a contract of insurance that ambiguity must be construed in favour of the insured as opposed to the insurer.

[16] In my view there is no ambiguity. In particular, if one had regard to the contract together with its endorsements and one such particular endorsement is number 4, where the definition of an agreement value clause is set out.

> 'It is hereby understood and agreed that in consideration of the insured aircraft being covered on an agreement value basis, all reference herein to replacement shall be deemed to be deleted, but only in respect of claims adjusted on the basis of a total loss.'

This was in amplification of clause 4 of the main agreement which referred to the cost of the repair in the case of partial loss. Endorsement no 4 goes on to provide that the claims arising in respect of partial loss of damage the insurer shall retain the right to repair, replace or make good as they deem it expedient.

[17] Therefore in my view and upon proper interpretation of this contract, it cannot be said that it is only the insured (that is the applicant in this matter) who can select where the aircraft must be repaired or select that the aircraft is in fact a CTL. In respect of clause 4 of the main agreement which defines partial loss, a formula is set out and the insured

is paid in a particular way.

[18] For example, in the event of damage being repaired by the insured and not the insurer, the actual wages paid for labour will be allowed at normal rates plus two hundred and fifty percent, or alternatively at the insured's option (again insured) shall be charged at the insured's average man hour tariff applicable at the time, material and parts shall be allowed at actual cost plus up to thirty percent.

[19] In other words clause 4 in the main agreement specifically applies to when the insured does the repairs. But the endorsement to that clause clearly provides for an insurer to retain the right to repair, replace or make good the aircraft as they deem fit.

Compromise

[20] There is a further claim in support of its claim which the applicants contend for, and that is that there was a compromise on behalf of the respondent. It is common cause that Mr Van Der Merwe was appointed on behalf of the respondent to assist in the evaluation of the damage and to investigate further. Mr Van Der Merwe is an aviation surveyor and his final paragraph in his report of 28 December 2012 makes the following, and I emphasize:

> 'Subject to the underwriter's agreement we recommend a loss reserve be established on the basis of a constructive

> total loss. We additionally recommend a fee reserve of £8 000. We trust the above and aforementioned is found to be in order and look forward to receiving underwriter's return comments accordingly. In the meantime our investigations continue with further reports to follow.'

[21] The compromise claimed by the applicants must be assessed in the light of all the evidence that is before the court. Clearly this letter sent by Mr Van Der Merwe (the Aviation Surveyor on behalf of the first respondent) says unequivocally 'subject to the underwriter's agreement', that is the respondent, he makes a particular recommendation. He also says that he looks forward to receiving the underwriter's comments by return. Whatever recommendation he makes, he is still reliant on the final instruction of the first respondent. The applicant has also quoted in detail excerpts from a meeting held with Mr Van Der Merwe.

[22] What is of importance here is that Mr Van Der Merwe was informed at the time that Global Aviation was the only company who could do the repairs, and they persuaded him that they, the insured (that is the applicant), could make an election as to whether the aircraft should be a CTL or be repaired. On a proper reading of the transcript of that meeting it is clear that based on the information given to Mr Van Der Merwe he could never have been in a position to appreciate the full facts, and therefore did not and could not bind the first respondent if regard be had to his report which I have referred to in great detail.

[23] On the question of the dispute of fact on whether the aircraft is a CTL or whether I must accept the respondent's version of partial loss and the cost of repair, the respondent has requested the court to take into account that much before the time when this matter was enrolled and indeed 1 week before the hearing of this matter, the applicant was requested by the respondent not to proceed with argument because of the disputes of fact, and they were pivotal issues to be decided.

[24] The applicant did not use the opportunity to postpone this matter for trial instead it was bent on obtaining its relief despite the apparent and manifest dispute of facts. In my view on any basis the disputes of fact are significant as to whether this damage constitutes a CTL or whether I must accept the respondents' valuation. I accept that the respondent's valuator did have the necessary B category and could provide the valuation that it did.

[25] On a proper application of the Plascon-Evans Rules I must therefore accept the version of the respondents and only if the version is uncreditworthy, fictitious, implausible or so farfetched can I reject it merely on these affidavits. Basically the applicants contend that the cost of repair is almost $2 600 000. The respondent on the other hand contends that the cost of repair is R1 100 000 and this quote was received from the accredited AMO. There is more than R1 000 000 difference and this is highly significant. The applicants suggestion that the respondents ex AMO or expert did not actually inspect the aircraft means that it would be

impossible on these papers as they stand to make a finding that the aircraft was in fact a CTL and therefore exceeded the seventy five percent of the agreed value between the parties.

[26] I cannot accept that the SACAA are the appropriate agencies to delegate and indicate which service provider must do the repairs. As I understand the correspondence from that governing body, it is their duty to make sure that a repairer has the necessary qualification and the fact that Global Aviation was mentioned in that letter is no more than that, that Global Aviation did have the necessary B category accreditation to effect the repairs. Furthermore on a proper analysis and context of Mr Van Der Merwe's input I cannot find that he bound the respondents or that he in fact reached a compromise, even a conditional compromise on this.

[27] A further submission on behalf of the respondent is that of repudiation. On 29 September 2014 the respondent requested the applicant to tender the aircraft for repair, and that the failure to do so would constitute a repudiation of the policy. The applicants failed to do so and on 30 January 2015 the respondents accepted the applicant's repudiation and cancelled the policy. In the result, there is before me now a claim on behalf of the applicants in respect of the policy which the respondents contend has been cancelled.

[28] The applicants also filed a further set of Heads of Argument dealing with the issues raised by the respondent, and reference is made to the fact again that Phoebus Apollo (that is the service provider) chosen by the first respondent was not an accredited AMO and didn't have the B category accreditation and therefore there could be no repudiation of the policy by the applicant. But in any event the main submission by the applicant was that it would exercise its rights in terms of clause 3(b) of the insurance policy and it had the option to elect whether to pronounce the aircraft a CTL or alternatively what and in addition decide which service provider to use or which AMO to use to make that valuation.

[29] The respondent has sought an order of costs on the attorney and client scale having regard to the forewarning the applicant had as to the massive disputes of fact in this matter. The applicant relied on the case of *Marques v Trust Bank of Africa Ltd & another* 1988 (2) SA 526 (W) 530 – 531 where Morris AJ differed with other cases and found that counsel should not be saddled with the burden of having to decide whether the disputes of such a nature are incapable of resolution on the papers because that was the very issue the court had to decide.

[30] The respondent referred the court to a recent appellant division authority, where it was clear that a party had to make its election if it was to proceed with seeking relief by way of notice of motion. It must at his own peril proceed by way of application. I refer to the case of Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd 1982 (1) SA 398 (A) at 430 (g – h), also

the case of Carrara & Lecuona (Pty) Ltd v Van Der Heever Investments Ltd And Others 1973 (3) Sa 716 (T) 720 (b – f), where the principle is reiterated namely that a party should not proceed by way of motion proceedings in the event that it could have anticipated a dispute of fact.

[31] The further question is whether the applicant's conduct is such as to justify an attorney and client order. In my view the case made out by the applicants is founded on potential disputes of fact. In addition, when the answering affidavit was filed and when the further supplementary affidavit was filed by Phoebus Apollo Aircraft Repairers, the applicant should have demurred before it set out to progress the application to the extent it did. I do not see how, at the very end when the shoe pinches, that the applicant can then seek a referral to trial in the face of all the warnings given by the respondents. I asked the parties whether the applicants claim had prescribed or would prescribe if I were to dismiss the application. I am advised that the applicants have until December 2015 in order to file an action in the event that I dismiss this claim.

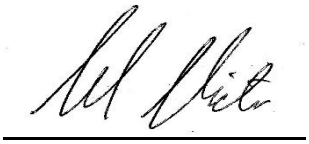
[32] I have given careful consideration to the amount of work that has gone into this application however there is nothing that persuades me on the applicant's case that it should have proceeded by way of application.

[33] I am also not convinced that an attorney client scale award would be appropriate in these circumstances. In particular the vigour with which the applicants seek to progress their claim must be seen in context. There

are large damages involved and I do not find it appropriate to punish the applicants because their livelihood is at stake, and they decided to persevere none the less.

In the result the order that I make is the following:

The application is dismissed with costs, including the costs of two counsel and it stands as between party and party.



M. VICTOR

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

Appearances:

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Date of hearing:	2015-05-19
Date of judgment:	2015-05-25