REPORTABLE **Case No AR 258/2009**

IN THE HIGH COURT OF KWAZULU-NATAL,
PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

In the matter between :

JNC HELICOPTERS CC Appellant
(Plaintiff in the Court *a quo)*

and

CIVAIR HELICOPTERS CC Respondent
(First Defendant in the Court *a quo*)

Delivered : 14 AUGUST 2009

J U D G M E N T

LEVINSOHN DJP

[1] For ease of reference and convenience I shall refer to the parties to this appeal by their respective designations in the Court *a quo*.

[2] The plaintiff sued the first defendant for damages caused to its helicopter which made, what is euphemistically called a hard landing off Ansteys Beach on the KwaZulu-Natal coast. The

plaintiff based his cause of action on contract, alternatively delict. The Court *a quo* was asked to decide the issue of liability only and adjudication on the quantum of damages was to stand over.

[3] After hearing evidence the learned judge in the Court *a quo* absolved the first defendant from the instance with costs. With leave of the Supreme Court of Appeal the plaintiff appeals against that judgment.

[4] It was common cause between counsel at the hearing of the appeal that the pilot of the helicopter had negligently failed to monitor the helicopter's fuel content and that resulted in the hard landing. The crisp issue before us was whether the plaintiff had proved its version of the contract, namely, that it had leased the helicopter to the first defendant, that the defendant was required to return it to the plaintiff in the condition in which it was received and that it had failed to do so and was therefore in breach of the contract of lease.

[5] The background surrounding circumstances are highly relevant to decide the issue before us and I proceed hereunder to summarise in broad outline the evidence adduced by the respective parties.

[6] Carol Anne Sobey, at present the sole member of the plaintiff, testified that at the relevant time she was the managing member of the plaintiff. The helicopter in question, described as "HTR", was in the plaintiff's possession pursuant to an agreement between the plaintiff and Wesbank. All risk of loss and damage vested in the plaintiff.

[7] Sobey spoke about the Nokia Surf Rescue contract which is offered to operators from time to time. In February 2003 helicopter operators were invited to tender for this contract which was to endure for a period of some nine months. The principal requirement was that the helicopter operator who tenders must be recognised as a licensed operator in terms of the statutory requirements laid down by the Civil Aviation Authority.

[8] The plaintiff tendered for this contract but was unsuccessful. The first defendant however tendered and was successful. It obviously held out that it was a licensed operator in terms of the statutory requirements. Furthermore in terms of the Nokia contract the first defendant was obliged to provide for insurances for the lifesaving crew members and that was to include medical cover, loss of life and disability. Also members of the lifesaving crew would be indemnified by the operator for loss or damage to the aircraft.

[9] Sobey confirmed in her evidence that the pilot, Mr Henry, would have been a permitted pilot in terms of the insurance policy held by the first defendant.

[10] Sobey was shown a document headed "Memorandum of Agreement". This document is in fact a draft agreement which was submitted to the plaintiff by the first defendant. It is a fairly lengthy document which proposes to bind the plaintiff to a service agreement which meant that the plaintiff would undertake to perform the first defendant's

obligations which it (the first defendant) had undertaken in terms of the Nokia Surf and Rescue contract. Also the plaintiff would supply a helicopter fuelled, maintained and insured. It would not supply the pilot. The first defendant would supply the pilot, one Murray Henry, or another suitably qualified pilot if Mr Henry was not available. In consideration for this the first defendant would pay a rate of R4 190,00 per hour including VAT.

[11] Counsel for the plaintiff took Sobey through the various clauses in the draft agreement. She characterised these clauses as being unacceptable. She was asked what her reaction was and that of Mr Green, her assistant, to concluding an agreement on these terms. She said : -

> "I told Mr Green to please get back to them and tell them that there is no ways we would accept these conditions and terms, they had been awarded the surf rescue tender and they were wanting to hold us to the terms and conditions of that tender, which was not acceptable to us."

[12] Following upon her discussion with Green about the contract, the latter sent a fax which was put in as exhibit "B" in the case. This fax was sent by Green to one Jean at the first defendant. It is dated 8th October 2003. The message is quoted in full :-

> "**MESSAGE**
>
> Re Nokia Contract
>
> HTR (float equipped) will be available from next weekend onward (Sat 18th Sun 19th) but only on a charter basis. JNC do not wish to be bound by any service agreement but Murray can use the jetty on a hire + fly basis; cost R3800 + VAT per hour, 4 hours payment required in advance of each weekend's charter. Any queries contact Carol.
>
> Regards FG"

[13] Sobey said that Henry was permitted to pilot the helicopter in question following upon the transmission of the fax in question. There was no discussion about who would be the operator of the helicopter and whose operating certificate would be used. Sobey regarded the first defendant as the operator. She said that it was possible for a helicopter owned by one company to be operated on

the operating certificate of another. She said that first defendant, had it wanted to do so, could have put the helicopter on its operating certificate. There was a procedure in terms of which certain documents would be submitted to the CAA at that time. As long as the documents were submitted the particular operator would be deemed to have a temporary licence to operate it.

[14] Fred Green was called by the plaintiff. He is the author of the fax referred to above. He basically confirmed Sobey's evidence in regard to the service contract that was received from the first defendant and the plaintiff's reluctance to conclude an agreement in terms thereof, the reason being that the service contract required that the plaintiff take on "far more responsibility than was justified". He was instructed by Sobey to get in touch with the first defendant and tell it that if the plaintiff's helicopter was required it would have it on the plaintiff's terms and not on the terms stipulated by the first defendant. It was

in those circumstances that he addressed the fax, exhibit "B".

[15] The principal witness for the first defendant was Mr A. A. Cluver. He referred to negotiations which had taken place with the plaintiff's representative in February. In his view the plaintiff and the first defendant had agreed on a rate for the hire of the helicopter at R3 800 excluding VAT. He tried to suggest that that rate would have been applicable to the October 2003 agreement and to that extent he tried to rely on an exchange of emails in February 2003. In my view, to the extent that the first defendant attempted to rely on the February situation governing the contractual terms applicable in October 2003, that attempt in my view was a dismal failure. The evidence of Cluver was most unsatisfactory on this aspect. That is evident from a quotation from the record : -

> "You see what I understand from your evidence moments ago was that all you really talked about and agreed in February, was the rate, is that correct? --- Which was the agreement C and D.

Yes, it's the rate that you arrived at and you referred …[intervention] --- Yes, I agreed to that.

And you referred to the emails? --- Yes.

But by no one's stretch of the imagination can we say that that agreement with Mr Hill in February which I think according to the February agreement be regarded as applying to whatever happened in October leaving aside the rate, is that correct? --- That could be correct, yes.

Because if one needed – I mean let's be fair – February you exchanged some emails, in October you send a full written comprehensive agreement … [intervention] --- As a proposal, yes.

That's rejected? --- That's correct.

In return you get Annexure B? --- Yes.

At no stage during any of these October discussions or exchange of correspondence is any reference made to February or the February agreement, am I right? --- I presume it could be correct.

You can't suggest otherwise? --- No, I can't.

……

HUGO J You proposed R4 190? --- No, that is not correct, that was proposed, but that is a mistake. It's … {Intervention]

MR MARAIS What do you mean it was a mistake? --- Well, that agreement was never agreed to for the R4 100.

HUGO J Yes, but that is – I'm talking about your proposal. Please just listen to what I say. Your proposal was for a different rate to the R3 800? --- It was meant to be at the time R3 800 plus VAT.

MR MARAIS But it says R4 200 --- Okay, it says R4 200 it's slightly cheaper, all right.

The point I'm simply wanting to make, is you would hardly be sending a document out saying R4 200 if you considered yourself down (*sic*) to R3 800 a different amount, even if you added VAT. Do you follow what I'm saying? --- I follow what you are saying, there was a mistake in that.

Does it make sense to you? And so surely it couldn't possibly have meant that all of that means, in other words the fact that you send the proposal with a new all embracing set of terms, with a new price. That you get a rejection of that and the response that deals with price in Fred Green's fax? --- Yes, back to the original price."

[16] Cluver said that the February agreement provided for a rate in respect of the pilot and the

helicopter. He conceded that in October 2003 he submitted what he calls a proposal which embodies terms and conditions which are far more extensive than that provided for in the so-called February agreement.

[17] In my opinion Cluver's reliance on the February emails and his attempt to engraft those alleged terms into the October contractual situation is, to say least, opportunistic in the extreme. The learned judge in the Court *a quo* observed : -

> "I disagree with the defendant's version that the February contract lasted until the October incident.".

[18] The first defendant's conduct in sending the draft agreement to the plaintiff in October 2003 is suggestive of an intention on first defendant's part to conclude a one-sided contract with plaintiff imposing extensive and onerous obligations on it. Importantly, the plaintiff was required to assume the first defendant's obligations in terms of the Nokia contract. It

would also be responsible for loss and damage caused to the helicopter. It was stipulated too, as mentioned above, that the pilot Henry would be supplied by the first defendant.

[19] The plaintiff's reply is a telling one. It unequivocally rejects the service agreement sent to it. It states categorically that it does not wish to be bound by its terms. However "Murray can use the jetty on a hire + fly basis; cost R3 800 + VAT".

[21] What does all this signify? In my view the language used is plain. Looked at against the background of the evidence of surrounding circumstances, particularly the submission of the draft agreement, the plaintiff was saying to the first defendant "I reject your service agreement. I do not wish to be bound by it. You may hire my helicopter for a fee of R3 800,00 plus VAT per hour. You can use your own pilot Henry to fly the helicopter".

[22] In my view there was no need when interpreting this document to become bogged

down with aviation technicalities, particularly the meaning of "hire and fly". In the context as stated above, the plaintiff rejected the service agreement submitted but conceded that it would agree to hire the helicopter piloted by the person that was mentioned in the service agreement.

[24] Manifestly the first defendant upon receipt of the fax agreed to those terms. More particularly that it would hire the helicopter and it would supply its own pilot. In my view this feature is crucial to the resolution of the dispute in *casu*. It points to the first defendant having leased the helicopter and having employed its own pilot to fly it. The plaintiff has thus in my view established on a balance of overwhelming probability that the first defendant leased the helicopter in question and was thus responsible for its safe return.

[25] Finally, I should mention that the concept of a "charter" could in a particular context be

interpreted as a lease of a movable, and this is particularly so in an aviation context.

[26] In ***Nel v Santam Insurance Co Ltd*** 1981 (2) SA 230 Nestadt J (as he then was) said at 248 : -

> "What I have to construe is, of course, the meaning of "charter" in the expression "purposes of use; private, business, pleasure and charter" in the schedule to the policy. Whilst the meaning of the word was, in what I have quoted above, being dealt with in relation to shipping, I see no reason why it should not bear a similar meaning when used in conjunction with an aircraft. The question is, which of the two meanings it should be given, or rather, which of the two meanings it bears. The difference may well be vital. If it be construed as permitting the plaintiff to lease out the aircraft with a resultant loss of possession and control, then there is much to be said for the argument that, this state of affairs falling within the terms of the policy and the contemplation of the parties, the sale and delivery of the aircraft would not be a material change within the meaning of clause 3."

See also ***Montelindo Compania Naviera SA v Bank of Lisbon & SA*** SA 127 at 135.

[27] The use of the word "charter" in the plaintiff's fax is entirely consistent with the notion of a lease as explained in the above cases.

[28] In the result the appeal ought to be allowed with costs. The judgment of the Court *a quo* is set aside and there is substituted therefor the following order : -

(a) It is hereby declared that the first defendant is liable to compensate the plaintiff for any damage the plaintiff has sustained in consequence of the hard landing made by the helicopter "HTR" on 18th October 2003.

(b) The first defendant is directed to pay the costs of the action to date.

SWAIN J : I agree.

KOEN J : I agree.

LEVINSOHN DJP : It is so ordered.

DATE OF JUDGMENT :	14 AUGUST 2009
DATE OF HEARING :	3 AUGUST 2009
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