REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: **A560/13**

6/9/2016

(1) REPORTABLE: NO/YES

(2) OF INTEREST TO OTHER JUDGES: NO/YES

(3) REVISED.

(4) Signature 19/09/2016. Date

MAROI BOERDERY CC — **PLAINTFF/ 2ND APPELLANT**

and

MANNETJIE RABIE — **1st DEFENDANT**

MONTANA AIR CC — **2nd DEFENDANT**

MULTI AIRCRAFT SERVICES CC — **3rd DEFENDANT**

And

DELRA PLANT HIRE CC — **THIRD PARTY/FIRST APPELLANT**

APPEAL - JUDGMENT

KHUMALO J (with THLAPI J and BAFILATOS AJ concurring)

INTRODUCTION

[1] This is an appeal against the judgment delivered by Makgoka J on 1 August 2011, in terms of which he made the following order:

> [1.1] The Plaintiff's claims against both the 1st and 3rd Defendants are each dismissed with costs;
>
> [1.2] Judgment is granted against the Third Party ("Delra Plant Hire CC") in favour of the Plaintiff.

[2] The 1st Appellant Delra Plant Hire, ("Delra") is appealing the order made against it in favour of the 2nd Appellant, Maroi Boerdery CC. In turn, the 2nd Appellant ("Plaintiff") is cross appealing against the dismissal of its claim against the 3rd Defendant and against the costs order awarded to the 1st Defendant, Rabie Mannetjie. The appeal is with leave of the court a quo. I shall, for the sake of convenience, refer to the 1st Appellant as Delra and the 2nd Appellant as Plaintiff. All other parties are referred to as in the court a quo.

[3] The Plaintiff instituted an action against the 1st Defendant, a director at Delra, claiming the repayment of R419 000.00 it allegedly paid to 1st Defendant to purchase a used aircraft, a 1975 Socate Rallye 235E with registration Z5-JSH ("the aircraft"), and against 2nd and 3rd Defendant for damages it alleges to have suffered as a result of the aircraft having been found to be corroded on its sparwings and not airworthy.

[4] The 1st Defendant was sued allegedly in his capacity as the owner of the aircraft and the 2nd and 3rd Defendants as agent companies that certified the aircraft to be in good condition and furnished a Mandatory Periodic Inspection ("MPI") report shortly before it was sold to the Plaintiff. The claim against the 2nd Defendant, was settled during the trial.

PLEADINGS

[5] In its Plea, 1st Defendant alleged that the aircraft belonged to Delra. As a result Plaintiff joined Delra as a Third Party and proceeded henceforth on the basis that either the 1st Defendant or Delra was the owner who sold it the aircraft.

[6] Plaintiff alleged that 1st Defendant and Delra duly represented by Piet van Blerk t/a Flying Trust ("Van Blerk") concluded the sale and expressly or tacitly warranted the aircraft to be airworthy, fit for the purpose for which it was intended, free of latent defects and to have been subjected to a pre-purchase inspection, conducted by the 3rd Defendant and supposedly paid for by the 1st Defendant, when the aircraft had extensive corrosion, rendering it un-airworthy.

[7] The 3rd Defendant was also accused by the Plaintiff of having breached an agreement it allegedly concluded with Delra on 3 August 2003 by failing to carry out a pre-purchase inspection in a workmanlike manner and to report on the extensive corrosion that was present on the aircraft.

[8] In the alternative Plaintiff alleged that **the 3rd Defendant had a legal duty of care which it breached, resulting in it suffering damages** which include costs incurred for further inspection to ascertain the extent of the corrosion, as well as storage costs and the costs of leasing an alternative aircraft amounting to R302 762.76. The amount was during the trial amended to R483 285.64.

[9] The 1st Defendant denied entering into an agreement with the Plaintiff in terms of which he received any form of payment from Plaintiff and being liable for the latter's damages. He however pleaded that the aircraft was sold by Delra to Flying Trust on August 2003. This was confirmed by Delra, it too denying any liability to the Plaintiff.

[10] The 3rd Defendant denied concluding an agreement with the Plaintiff that it had breached, or owing the Plaintiff a duty of care.

[11] The court a quo found that the issues to be decided upon were twofold, namely:

[11.1] Whether when Barry or Van Blerk sold the aircraft to the Plaintiff, he was acting as an agent of the 1st Defendant and Delra or of Flying Trust.

[11.2] Whether the **3rd Defendant owed a duty of care to the Plaintiff** when it performed the MPI in August 2003 and **whether its failure to report the corrosion on the aircraft resulted in the Plaintiff suffering the damages claimed.**

EVIDENCE LED

[12] The evidence relating to the conclusion of the sale of the aircraft was, on behalf of the Plaintiff, led by Nel, Barry and Van Blerk. The experts, Myers, Portwig and Greger, gave an expose` of the nature and extent of the corrosion found on the aircraft.

[13] Nel, a trained pilot, who is with her husband a member of the Plaintiff, testified that during 2003, she came across an advertisement by CDC Aviation (Pty) Ltd ("CDC") offering the aircraft for sale. She arranged with Van Blerk the owner of CDC to view the aircraft where it was stored at Lanseria Airport ('Lanseria"). Accompanied by her father, she was shown the aircraft by Van Blerk. Her father, once an owner of a similar aircraft and knowledgeable on such aircrafts was impressed. The aircraft was then flown to Wonderboom Airport at their instance for a pre-purchase inspection which was carried out by one Riekert Stroh of the 2nd Defendant. Stroh reported minor problems that he insisted must be fixed before the aircraft is sold. Thereafter Barry, a salesman at CDC facilitated the sale. Van Blerk assured her that the repairs will be paid for by the owner, identified by Barry to be the 1st Defendant.

[14] On completion of the repairs Nel, on behalf of the Plaintiff, paid the purchase price to ED Flying Trust and flew the aircraft to Musina. She flew it frequently to accumulate as many hours as she could towards qualifying for her commercial flying

license. A few weeks later the studs to the nose-wheel fell off. The aircraft was taken to Wonderboom where Stroh fixed the problem. During June 2004, a further problem was encountered now with the aircraft's radio. She took the aircraft to one Mike Myers ("Myers") at Naturelink who suggested to do an MPI test as well. The test revealed corrosion on the aircraft's spars-wing that someone had tried to "paper" over. According to Myers the aircraft could not fly, and fixing it was not commercially feasible. The aircraft remained stored at Naturelink that levied **storage charges** of R500 per month. Nel alleges that she would not have purchased the aircraft had she been aware of the defects. She bought the aircraft from CDC and Van Blerk who never mentioned Delra or 1st Defendant nor had she ever heard anything about the company before.

[15] Under cross examination she confirmed that she purchased the aircraft from CDC, and that her particulars of claim were incorrect. The allegation that R399 000 was payable to 1st Defendant was also incorrect. The allegation that R20 000 payment of commission to Flying Trust was part of the oral agreement, was also incorrect as this amount was part of the purchase price.

[16] According to Barry, he was at the time employed as a salesman by CDC Aviation, Van Blerk's company, earning a commission. **He saw the aircraft for the first time at Lanseria where it was stored for some time. In November 2003 he saw the aircraft at Transafrican Aviation, freshly painted and upholstered and contacted 1st Defendant whom he has known since the days when he was still employed at Transafrican, to find out if he would be interested in selling the aircraft.** 1st Defendant was prepared to sell the aircraft for R350 000.00 (excluding Vat) not mentioning who the owner was. He although was aware of Delra from his days at Transafrican. **Using CDC's letterhead**, he advertised for the sale of the aircraft on the internet without revealing the ownership nor the capacity in which he was selling the aircraft. Nel responded to the advertisement. The aircraft was taken for a pre-purchase inspection and minor problems were identified. 1st Defendant paid the costs of repairs. **Until that time he had not mentioned the 1st Defendant as the aircraft's owner**. The aircraft was never his or CDC's or Flytrust's. Nel purchased the aircraft on behalf of Plaintiff and an invoice was issued by Flytrust to Plaintiff. **The amount on the invoice made out to Flying Trust** was transferred to the personal account of the 1st Defendant on 19 November 2003.

[17] Barry agreed under cross examination that 1st Defendant acted on behalf of Delra and that he never revealed to the 1st Defendant the name of the Plaintiff as the purchaser nor did he tell him about the R20 000 commission. H**e deliberately also did not tell Nel about the 1st Defendant** to avoid direct communication between them and in order to secure the commission. They could have dealt directly with one another, denying him his commission**. He was at no stage authorized by either Delra or Venter, who was a director at Delra to sell the aircraft on behalf of either of them.**

[18] Van Blerk a director and shareholder of CDC indicated that Flying Trust was the main entity holding shares in **CDC whose principal business was buying and selling aircrafts**. His evidence was similar to that of Barry. **He could not produce any document that confirmed a direct sale of the aircraft between the Plaintiff and the 1st Defendant and /or Delra.**

[19] Myers, the expert, confirmed the MPI results of the inspection he conducted on the aircraft when he found the corrosion to be extensive. The aircraft was also inspected by Portwig and Greger both senior employees of the Commissioner for Civil Aviation confirming the nature and extent of the corrosion. They all agreed that had the 2nd and 3rd Defendant properly carried out the MPI and inspected the logbook where the existence of the corrosion was already recorded by a previous MPI, they could have detected the corrosion and taken remedial action. Furthermore, **the 3rd Defendant failed to adhere to the regulations and technical standards prescribed by the CAA p**ertaining to performing the MPI. They concluded that the aircraft was valueless as it was not airworthy and was unrepairable. .

[20] Snyman the physical Metallurgist, the last witness to testify did not take the matter any further. The logbook already established the time lines in respect of the corrosion whose existence seemingly was not disputed.

[21] Besides the 1st Defendant testifying on his behalf, he together with Venter testified on behalf of Delra.

[22] Venter testified that he, the 1st Defendant and his step-son were members of the Delra. The 1st Defendant managed the business whilst he was involved in the financial aspects of the business. Delra bought the aircraft in August 2002 for R159 000.00 through a sale facilitated by Barry who was also to attend to its registration in the name of Delra. They took delivery in September 2002. Registration never took place, notwithstanding Barry undertaking to do it. His attempt to register the aircraft himself with the CAA failed. He was informed that it could not be registered as the certificate of registration was outstanding. The 3rd Defendant refurbished the aircraft with a new dashboard panel, leather seats and fresh paint. 1st Defendant then flew the aircraft to Lanseria Airport for service. At Lanseria it could not start due to a flat battery. 1st Defendant called Strimer from 3rd Defendant who replaced the battery. 1st Defendant then flew it to Margate and returned. A few weeks later Venter experienced problems doing a pre-flight inspection. He called Strimer to collect and repair the aircraft and for 3rd Defendant to do an MPI inspection since the report was due in a month. The inspection was done on 27 August 2003 and the aircraft remained with 3rd Defendant. **After Barry had spoken to 1st Defendant about the sale he asked Barry for the entity in whose name the tax invoice was to be issued. Barry told him to issue the invoice in the name of Flying Trust.** Venter gave Barry the 1st Defendant's account details into which the purchase price was to be paid because Delra owed 1st Defendant money and the purchase price would liquidate the debt.

[23] **Barry never indicated to him his intention to advertise the sale of the aircraft, or that he had done so nor did he mention his intention to sell it on behalf of Delra to the Plaintiff or any other person. He neither mentioned Van Blerk or the Plaintiff nor the commission he was earning from the sale**. Furthermore, if payment was not made, Delra would have looked to Barry or Flying Trust.

[24] The 1st Defendant's testimony was corroborative of Venter's evidence. He confirmed that Barry phoned and asked him if he would be interested in selling the aircraft. He later also asked to do an inspection on the plane. According to him he sold the aircraft to Barry. After that Venter took over on behalf of Delra. Venter showed him the Fly Trust invoice during the court case. He was adamant that neither he nor Delra mandated Barry to sell the aircraft on behalf of Delra. They would not have sold it to any another entity except Barry because it had no registration papers. Barry knew about it.

[25] No evidence was led on behalf of 3rd Defendant.

[26] The court did not make any factual findings and decided the matter based on probabilities, holding that by their conduct, 1st Defendant and Venter, directors at Delra, acting on behalf of Delra, authorized Van Blerk t/a Flying Trust (represented by Barry) **to sell the aircraft to a third entity**, which happened to be the Plaintiff. Therefore holding that Plaintiff's restitution claim against Delra should succeed and dismissed with costs the claim brought against the 1st Defendant in his personal capacity on the basis that it is not supported by the evidence led. It also burdened the Plaintiff with a costs order on the ground that it should have withdrawn the claim against 1st Defendant when it joined Delra as the Third Party.

[27] The court further regarded its decision finding Delra liable, to exclude the possibility of the 3rd Defendant being liable as well. The claims were found to be mutually exclusive, and it declared that the Plaintiff could not succeed against both. On the other hand stating that, if its finding of mutual exclusivity is negated, its conclusion would be that, for 3rd Defendant's **liability to arise there must be a *causal nexus* between 3rd Defendant's negligence and the Plaintiff's damages; further** holding that neither a special relationship nor a sufficiently close connection between the 3rd Defendant's negligence and the Plaintiff's damages was established. Accordingly finding that the ultimate loss suffered by the Plaintiff was too remote.

APPEAL

[28] Delra's grounds of appeal against the findings of the court a quo are that:

> [28.1] the court erred when it concluded that a tacit agreement of mandate was concluded between Delra and Van Blerk, and that pursuant to the agreement Van Blerk represented by Barry acted as an agent of Delra and concluded an oral agreement of sale with the Plaintiff;

[28.2] the court erred when it found that the mentioned tacit agreement could be inferred from the surrounding circumstance, since the Plaintiff failed to establish a tacit mandate. Therefore such tacit mandate could not be inferred from the conduct of the Delra's directors;

[28.3] the court a quo should have found that there was no evidence that Van Blerk was expressly or tacitly authorized or mandated to sell the aircraft on behalf of Delra and Plaintiff, having failed to discharge the onus it bore to establish the tacit mandate. On the contrary there was overwhelming evidence that Delra sold the aircraft to Barry/ Flying Trust.

[29] On the other hand the Plaintiff's grounds for appealing the findings of the court a quo in respect of the 3rd Defendant, are that:

[29.1] the court should have found that since the 3rd Defendant issued a certificate of release to service and certified the aircraft and all its equipment to be serviceable for flight, **it owed a duty of care to any pilot, passenger or prospective purchaser of the aircraft for the period of validity of the certificate,** because it would have been impossible to sell the aircraft as airworthy without the presence of a valid airworthy certificate, it could only have been sold with the existence of such a certificate;

[29.2] the court erred in finding that Plaintiff had not proven either factual or legal causation and **had not placed any reliance on the MPI performed by the 3rd Defendant when deciding to purchase the aircraft. It should have found that it was one of the factors that the Plaintiff's** representative took into account when deciding whether or not to purchase the aircraft;

[29.3] **the court erred when it found that 3rd Defendant could not have foreseen, when performing the MPI in August 2003, that the Plaintiff (or any other prospective purchaser) would on the strength of the assertion of airworthiness from the seller, purchase the aircraft.** The Plaintiff as a prospective purchaser should have been found to be a reasonably foreseeable purchaser in the light of the evidence that the aircraft was not able to be sold without a valid and current certificate of airworthiness.

[30] The Plaintiff did not persist with the allegations in its particulars of claim that there was an agreement between itself and the 3rd Defendant. It relied solely on the general duty of care. The issue will therefore be dealt with as raised in the particulars of claim and during the trial.

[31] The Plaintiff also criticized the court a quo for finding that its claims against Delra and 1st Defendant and as against the 3rd Defendant were **mutually exclusive**. It argued that the court should have found that both Delra and the 3rd Defendant were legally responsible for the Plaintiff's loss and could be held co-extensively liable to the

extent of their individual liability based on Delra's contractual liability and 3rd Defendant's delictual liability.

[32] The issues to be determined are summarized as follows:

[32.1] in respect of Delra's appeal; Whether from Venter and 1st Defendant's conduct interacting with Barry on behalf of Van Blerk, a tacit mandate could be inferred, it appearing as if Barry was selling the aircraft as an agent of Delra.

[32.2] in respect of Plaintiff's appeal:

[32.2.1] If the issuing of the MPI certificate or a guarantee that the aircraft is in good condition or good for its purpose, invoked a duty of care to the general public? that is a duty of care to third parties. It is also of significance to note that when the argument was raised in the court a quo it was not in such general terms. Its context was narrowed and restricted only to a duty of care owed to the Plaintiff. What the enquiry entails is establishing if 3rd Defendant's negligence in conducting the inspection was a direct cause of the damages suffered by the Plaintiff, as an alternative to any other potential purchaser, pilot or passenger, extending to the general public.

[32.2.2] Whether or not the Plaintiff's claims against the 1st Defendant and Delra on one hand and that against the 3rd Defendant on the other, were mutually exclusive? Could Delra and the 3rd Defendant be held co-extensively liable?

[33 I will however deal with the contentions in the following manner and sequence:

(i) Whether or not the evidence justifies the conclusion that was reached by the court a quo regarding the tacit mandate;

(ii) a determination whether the claims are mutually exclusive;

(iii) examine the law regarding the effect of issuing of a warranty or certification by a third party and liability on the breach of the duty of care, which enquiry entails establishing if 3rd Defendant's negligence in conducting the inspection was a direct cause of the damages suffered by the Plaintiff. I will assume that the negligence of the 3rd Defendant is no longer in contention.

TACIT MANDATE

[34] A tacit mandate is implied or inferred and is generally referred to as ostensible authority. It is defined as the power to act as agent, indicated by circumstances even if the agent may not truly have been given the power. The principal must have conducted himself in a manner that **misled a third party** into believing that the agent had authority. Similarly, misrepresentation can also create an appearance that the agent had authority to act on the principal's behalf which in our law is also known as

apparent authority. **While this kind of authority may not have been conferred by the principal it is still taken to be the authority of the agent as it appears to others; see *Hely-Hutchinson v Brayhead Ltd and Another* [1968] 1QB 549 (CA). If the agent in the circumstance holds himself out as having the nature and extent of authority he does not have, the company will be bound by his apparent authority to those who do not know the actual extent and nature of his authority if any. The emphasis being placed on the authority *"as it appears to others"*. This fact is enunciated in *Hely–Hutchinson* by Lord Denning's following words:**

> "The company is bound by his ostensible authority in his dealings with those who do not know of the limitation. He may himself do the "holding out", Thus if he orders goods worth €1000 and signs himself "Managing Director " for and on behalf of the Company, the Company is bound to the other party who does not know of the €500 limitation...."

[35] This is opposite to actual authority which decrees that an agent who wishes to perform a juristic act on behalf of a principal, requires authority to do so, either express or implied, for the act to bind the Principal. The principal will then have to confer the necessary authority expressly or impliedly and the agent is taken to have actual authority. See Kerr the *Law of Agency* 4ed (Lexis Nexis Butterworths 2006) at 27.

[36] In considering the point the court a quo, besides also mentioning *Hely*, referred to *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others* 2002 (1) SA 396 as distilling the requirements that the Plaintiff is required to prove, in order to establish the Defendant's ostensible authority. Unfortunately *NBS* has been found to conflate the elements of ostensible authority with those of estoppel and to have overlooked the statement taken from *Hely-Hutchinson CA* that emphasized that apparent authority **is the agent's authority as it appears to others.** For that reason *NBS'* status as the authority on the elements of apparent authority has been put to question; see *Makate v Vodacom* 2016 (4) SA 121 (CC).

[37] The conflation in *NBS* supposedly occurred as a result of an original statement that Lord Denning made in *Hely* with special reference to English law, which is pointed out to have been incorrectly imported into our law as it is, in *NBS*. Lord Denning had revealed that 'the presence of authority is established if it is shown that a principal by words or conduct has created an appearance that the agent has the power to act on its behalf. Nothing more is required. The means by which that appearance is represented need not be directed at any person. In other words the principal need not make the representation to the person claiming that the agent had apparent authority'. The statement was settled on as resolving the issue, ignoring that in the statement Denning stressed that '(o)stensible or apparent authority is the authority of an **agent as it appears to others.**' I fully agree with such sentiments. Consequently representation by the agent has to be taken into account as well, requiring that in any particular case, the court should examine closely how the authority was allegedly exercised in the company sought to be held liable and the purported agent in order to ascertain whose conduct and whose representations would bind the company.

[38] The court a quo proceeded then to apply incorrectly, as in *NBS,* the requirements of estoppel to determine whether from Venter and 1st Defendant's conduct a tacit agreement (of agency) can be inferred as having been conferred upon Barry, to sell the aircraft on Delra's behalf, and holding that this was proved. This was despite the evidence showing that the Plaintiff acted solely on the representation made by Van Blerk and Barry, who on the contrary confessed to have gone to great lengths to conceal information on the original owner. The real enquiry should have taken into account the conduct or representations of both Venter and 1st Defendant on behalf of Delra vis-a-vis that of Van Blerk and Barry as it appeared to Nel. The evidence of Nel being of importance in order to prove her state of mind.

[39] According to Nel she has never heard of Venter, 1st Defendant or Delra, nor was she aware of Barry's prior association with Delra or its directors. Barry was also *de facto* not in the employ of Delra. She knew Barry to be the salesman at CDC. The advertisement of the sale of the aircraft that she responded to was put up by Barry in the name of CDC. She arranged for the viewing of the aircraft with Van Blerk, the owner and director of CDC. Thereafter Barry facilitated the sale on behalf of CDC. Van Blerk oversaw the pre-purchasing inspection at Nel's father's instance and supervised the repairs. Ultimately Nel paid the purchase price to Barry c/o Flying Trust, which apparently was the holding company of CDC. Nel took possession of the aircraft from Van Blerk. These are the factual circumstances and conduct that influenced Nel at the time.

[40] Nel *a propos* conceded that she labored under the belief that CDC was the seller of the aircraft. Such a fact, together with the whole of the evidence, (including the documents filed of record and the purported agent's (Barry) representations) cannot be ignored as they are relevant to her state of mind, and are to be taken into consideration to determine the authority as it appeared to her. The statements and conduct must, when taken in total, be such as reasonably to convey to a person dealing with the purported agent/s, the impression that he has the authority to conclude the transactions in question on behalf of the alleged principal, and thereby inducing the belief in that person that they have the authority of the alleged principal. In *Electrolux v (Pty) Ltd v Khota* 1961 (4) SA 244 (W) Trollop J remarked at 250 C-E that

> `"the court should not be quick or over anxious to infer from an owner's conduct, including his negligence, a representation that the possessor is vested with the dominium or jus disponendi; the conduct should be such as to proclaim clearly and definitely to all who are concerned that the possessor is vested with the dominium or jus disponendi; secondly if the owner's conduct does not measure up to that high standard, the Court should then scrutinize the evidence of the Respondent carefully and closely to ascertain whether the representation was indeed the real and direct or proximate cause of the Respondent believing that the possessor did have the dominium or jus *disponendi.*"

[41] Barry corroborates Nel's evidence that he never mentioned to her who the original owner was, albeit for selfish reasons, to protect the deal and his commission. According to him he was preventing the possibility of the parties dealing with each other directly and cutting him out. Nevertheless, what is key is that he never presented to Nel to be acting on behalf of Delra or exhibited such authority at any stage. Therefore based on Barry and Van Blerk's evidence that they made representations as CDC, which led Nel to believe CDC was the seller, Plaintiff's purchase of the aircraft consequently had nothing to do with any representation or conduct by 1st Defendant and Venter.

[42] A further assessment of Barry's conduct to establish whether or not he intended to obtain a mandate from Delra that would bind the latter to Plaintiff proves the contrary. He did not inform any of Delra's directors of his decision to offer the aircraft for sale to the public nor did he mention the Plaintiff as the buyer for the recordal of the payment or transaction. The trial court's contention that it should have been of no consequence that Barry mentioned Flying Trust's name as the entity in whose name Delra was to issue a tax invoice, since the directors knew Barry as a salesman is unfounded. The contention is inconsistent with the totality of the appearances and representations as proven by all the evidence. Van Blerk had testified that **CDC carries on the business of buying and selling aircrafts** and **Flying Trust is a subsidiary of CDC.** It therefore would make sense if 1st Defendant or Venter said that they sold the aircraft to CDC and believed Barry and Van Blerk when they presented to them that the invoice should reflect the buyer to be Flying Trust that indeed it is so. That also cannot be countenanced, as *per* the court's finding, by Van Blerk's assertion that CDC had no intention of owning the aircraft since we are dealing with a conduct or representation that determines a perception "as it appears." There is nothing in the conduct of Van Blerk and Barry that indicated that they were offering to sell the aircraft on behalf of Delra. **Therefore the interest shown by 1st Defendant and Venter to Barry's enquiry about selling the aircraft cannot be regarded as conferring a mandate on him or Flytrust to sell the aircraft to third parties on Delra's behalf.**

[43] In *NBS,* whereas the facts indicated that it was not the appointment of Mr Assante (the purported agent) and the usual powers of the bank manager that attracted the plaintiffs specifically to his branch, but presentations Assante made. The application of the incorrect principle led to the court holding that his appointment amounted to representation by the bank that he had authority to conclude investment transactions of the kind made by him with the plaintiffs.

[44] The importance of consideration of all evidence was indicated in *South African Broadcasting Corporation v Coop and Others* 2006 (2) SA 217 (SCA) ([2006] ZASCA 30) (SABC) where it was stated that:

> "The Plaintiff's case was not limited to the appointment of the various relevant officers who acted on the SABC's behalf. It included their senior status, the trappings of their appointment, **the manner in which they went about their dealings with the**

> **plaintiffs, the use of official documents and processes**, the apparent approval of subordinate and related organisations, such as the pension fund and medical scheme, the length of time during which the Ludick option was applied, the Board's own financial accounts and the conduct of the CEO's who were Board members."

In the same way as in the *NBS* Bank case, the *SABC* created a facade of regularity and approval **and it is in the totality of the appearances that the representations relied on are to be found.'**

[45] In *casu,* notwithstanding the court a quo encouraging the evaluation of each piece of assertion against the total evidence, the court a quo went on and ignored some of the evidence on the basis that it was not in line with the pleadings.

[46] It is most significant that the Plaintiff bore the onus to prove or establish facts that show on a balance of probabilities, the conduct that induced it to believe that Barry and Van Blerk were acting on behalf of Delra (the alleged ostensible authority, other than CDC or Flytrust). Having failed to show such representation and in its place, there being the relevant concessions made by Plaintiff's key witnesses, Barry (the supposedly agent) and Nel, the court should have found that the Plaintiff failed to discharge the onus. Instead, it refused to attach any weight to the concessions, notwithstanding Plaintiff carrying the onus. The reason it proffered for disregarding the concessions was that they were at odds with the particulars of claim. It is not for the court to choose which evidence to rely upon when there is material contradiction between averments in the pleadings and those made during trial, especially by a party that carries the onus. This is an instance where an order for absolution from the instance would be appropriate, if not a dismissal; see *Forbes v Golach & Cohen* 1917 AD 559. The Plaintiff had failed to establish the ostensible authority it relied upon, therefore its claim should not have succeeded.

[47] Barry and Van Blerk's testimony though intended to support Plaintiff, by establishing Delra's conduct, circumstances or representations from which their agency could be inferred was devoid of any allegation of such conduct or representations. They also did not allege to have sought such a mandate nor to have made Venter or 1st defendant aware of their intention to sell the aircraft to a third party. Even when the sale was concluded, Delra was not informed that the sale was concluded with Plaintiff on their behalf. Payment was also done by Flying Trust.

MUTUAL EXCLUSIVITY

[48] The court a quo also had to decide how its decision on the liability of the Delra would impact on the question of whether or not a claim can also be brought against the 3rd Defendant, when the 3rd Defendant had argued and the court having concurred that claims against 1st Defendant and Delra and that against 3rd Defendant are mutually exclusive.

[49] It is of importance to note that the Plaintiff couched its claims such that from each of the 1st to 3rd Defendant and Delra, an amount of R483 285.64 for damages is

claimed, besides the claim on breach of contract on the basis of which repayment of the purchase price is sought from 1st Defendant and Delra. The court a quo found the claims to be mutually exclusive and made provision for an alternative order, in case of dissention. The general rule is subject to the qualification that the same conduct may amount to a breach of contract and a delict, provided the Plaintiff's declaration makes it clear by the necessary allegations of fact, that both wrongs have been committed there is no reason why he should not claim damages for both in the same action, provided he makes it clear what damages he claims for the breach of contract and what damages for the delict; see *Bull v Taylor* 1965 (4) SA 29 (A) 38G. So, finding in favour of the Plaintiff on the breach does not exclude a possibility of a further finding in favour of the Plaintiff on delict. The court will then have to frame its order in such a way that the Third Party is not overcompensated by recovering the same loss from both Defendants; The court in *Johnson v Jainodien* 1982 (4) SA 599 held that:

> "there was no reason why the two claims cannot be made against the two Defendants **respectively** without the Plaintiff having to rely, as against the second Defendant on a previous excussion of the first Defendant or on an inability on the first Defendant's part to meet the claim." (my emphasis)

[50] It is the same principle that applies in agency proceedings where it is also not necessary for the Third Party to excuss the principal before proceeding against the agent. The fact that the amount is the same in each claim is not of any significance. The fact that the amount claimed from each of the Defendants is identical does not in the circumstances afford a reason for importing the technical doctrine of excussion, which is normally applicable to a surety agreement, into a situation such as that arising in the present case. Accordingly the causes of action against the two Defendants might be different, still there is no reason why the two claims cannot be brought against the two Defendants respectively. Naturally it will, at the trial be a question of fact whether Plaintiff has suffered a loss which he claims from second Defendant. The amount he is likely to recover from the first Defendant could be a relevant consideration in the ultimate determination of the amount of the loss he has suffered and for which second Defendant is responsible; see *Johnson* v Janodien on p604H. This also should not inhibit the court to make the right order, should the Plaintiff be successful in the action, which would ensure that Plaintiff does not receive the amount in question from both Defendants. In that instance the delictual claim should contain all the elements of a delictual claim, sufficient to form the basis of a valid claim based on delict.

DUTY OF CARE TO THIRD PARTIES

[51] The issuing of a certificate to the owner of the aircraft guarantees not only the owner but also any other end user of such an aircraft of its airworthiness therefore invoking an obligation, that is the duty of care not only to the owner but also to all other potential end user or purchasers of that aircraft, that is the argument advanced against the 3rd Defendant. As the issuer of the certificate who has been found to be negligent

he must be held liable on the basis that he should have foreseen that potential users or purchasers will act on the strength of the certification.

[52] Our law now firmly recognises that a negligent misrepresentation will give rise to delictual liability provided all the necessary elements of such liability are satisfied; see *Axiom Holding v Deloitte and Touche*, Unreported case no 303/04 delivered on 1 June 2005 (SCA). However, decisions by courts on whether to grant or withhold a remedy for negligent misstatement causing economic loss, are made conscious of the importance of keeping liability within reasonable bounds.

[53] The test to be applied as expounded in cases of *S v Mokgethi en Andere* 1990 (1) SA 32 (A), at 39D – 41 B; *International Shipping Company (Pty) Ltd v Bentley 1990 (1) SA 680 (A), 694* I at 700 E-701G; *Smit v Abrahams* (109/1992) [1994] ZASCA 64; [1994] 4 All 679 (AD) (16 May 1994); *Standard Chartered Bank of Canada v Nedperm Bank Ltd* (320) /93) [1994] ZASCA 146; 1994 (4) SA 747 (AD); [1994] 2 All SA 524 (A) (30 September 1994), is a flexible one in which factors such as **reasonable foreseeability, directness, the absence or presence of a *novus actus interveniens*, legal policy, reasonability, fairness and justice,** all play their part.

[54] In general, a representor or provider of a certification has no duty to third parties with whom there is no relationship or where the factors as set out in the *Standard Chartered Bank of Canada v Nedperm Bank Ltd 534* and similar cases aforementioned are absent.

[55] The test for determining where the new cause has intervened between the conduct and the result is, as is in the ordinary case, one of **foreseeability,** that is, was the *actus* of a kind which a reasonable man would have foreseen as a possible consequence of his actions?

[56] The doctrine of foreseeability in relation to the remoteness of damage does not require foresight as to the exact nature and extent of damage. It is sufficient if a person sought to be held liable therefore should have reasonably foreseen the general nature of the harm that might, as a result of his conduct, befall some person exposed to a risk of harm by such conduct; see *Smit v Abrahams* p85.

[57] I however agree with the findings of the court a quo with regard to Plaintiff's claim against the 3rd Defendant, that the Plaintiff failed to establish any factual or legal causation. The onus was on Plaintiff to prove that the 3rd Defendant's negligent conduct caused or materially contributed to the harm giving rise to the claim. Which if proven, the second leg of the onus was to prove that the negligent act on the part of the 3rd Defendant was linked sufficiently closely or directly to the loss, for legal liability to ensue, or whether the loss is too remote; see *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34 E-G.

[58] The undisputed evidence is that the 3rd Defendant furnished Delra with the MPI on 27 August 2003 for the purpose of repairs and for Delra's usage of the aircraft,

since it was due. At the time 3rd Defendant would not have foreseen that the Plaintiff would purchase the aircraft allegedly on the basis of its report. Therefore there was no legal duty upon the 3rd Defendant towards the Plaintiff. The evidence led on behalf of Plaintiff also indicates that factually the MPI was not taken into account by Plaintiff when it bought the aircraft but it was on the strength of the pre-purchase inspection conducted by Stroh. The question of any MPI certificate was never raised when Plaintiff purchased the aircraft. There is no evidence that it formed the basis of its alleged contract and thus not a *causa sine qua non*.

[59] Under the circumstances I propose the following order:

THE ORDER

[59.1] The 1st Appellant's appeal is upheld with costs. The order of the court a quo against the 1st Appellant (Third Party) is set aside.

[59.2] The 2nd Appellant's cross appeal against the dismissal of its claim against the 3rd Defendant is dismissed with costs.

[59.3] The 2nd Appellant's cross appeal against the costs order in favour of the 1st Defendant is dismissed with costs.

N V KHUMALO J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA

I AGREE AND IT IS SO ORDERED

V V TLHAPI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION; PRETORIA

I AGREE

G BOFILATOS
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION; PRETORIA

For the 1st Appellant: ADV HOLLANDER

Instructed by: GJERSOE INC

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