IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 69139/2011

8/4/2015

(1) REPORTABLE: ~~YES~~ / NO

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

(3) REVISED.

8/4/2015 ... [signature]

DATE ... SIGNATURE

In the matter between:

LEADING PROSPECTS TRADING 38 (PTY) LIMITED — Plaintiff

and

CENTRIQUE INSURANCE COMPANY — First Defendant

BANIE TROMP — Second Defendant

JUDGMENT

MASIPA J

INTRODUCTION

[1] The plaintiff is Leading Prospects Trading 38 (Pty) Limited, ("Leading Prospects")owner of a helicopter, which was insured by Centrique Insurance Company,("Centrique") the first defendant. On 5 September 2011 the helicopter was involved in an accident when it flew into high voltage Eskom power lines in the Queenstown area on the R359 road. At the time of the accident Banie Tromp, ("Tromp")the second defendant, was the pilot of the helicopter.

[2] Leading Prospects commenced action against Centrique in which it claimed indemnity in terms of the insurance policy issued by Centrique. Alternatively Leading Prospects claimed damages from Tromp on the basis of breach of a contract or alternatively on the basis of delict. It was alleged that Tromp was negligent in causing the damage to the helicopter. One of the grounds of negligence relied on by Leading Prospects in its claim against Tromp is that he contravened Part 91.06.23 of the Civil Aviation Regulations which provides that a helicopter should not be flown at a height of less than 500 feet above the ground unless the flight can be made without hazard or nuisance to persons or property on the ground ("the Regulation").

THE CLAIM AGAINST THE FIRST RESPONDANT

<u>THE INSURANCE AGREEMENT</u>

[3] It is common cause that the full version of the policy wording attached as annexure "P1" is operative.

[4] In addition to the conclusion of the policy Centrique pleaded that an endorsement was issued to the insurance policy. The effect of the endorsement was that:

4.1 It would operate from 1 September 2011 until 10 September 2011;

4.2 Tromp was added as a named pilot; and

4.3 The breach of Civil Aviation Regulations clause and the 'Unauthorised Use' clause in the policy was suspended for the period 1 September 2011 to 10 September 2011.

[5] Leading Prospects called Mr Grobbelaar as a witness who agreed that:

5.1 The insurance policy contained a warranty to the effect that Leading Prospects warranted compliance with all air transportation, air navigation and airworthiness orders and requirements issued by any competent authority affecting the safe operation of the helicopter, which if breached would invalidate Leading Prospects's claim for indemnification.

5.2 The insurance policy included the 'Breach of Civil Air Regulations' Clause, which provided that the insurance policy would remain in force if there was a breach of the warranty provided that Leading Prospects had no prior knowledge of the circumstances in which the breach had been committed.

5.3 The insurance that had been effected after the endorsement had been included in the policy would operate if Tromp was flying the helicopter but there was no breach of the Civil Air Regulations.

5.4 The policy with the endorsement did <u>not</u> include the Breach of Civil Air Regulations clause.

[6] It is common cause between Leading Prospects and Centrique that the insurance policy does not have to indemnity Leading Prospects for damage to the aircraft if the aircraft was damaged whilst being flown in breach of a Civil Aviation Regulation.

<u>THE ACCIDENT AND THE BREACH OF THE CIVIL AVIATION REGULATION</u>

[7] Centrique alleges that when the accident occurred the helicopter was being operated in contravention of the Regulation because it was being flown at a height of less than 500 feet above ground which flight could not be undertaken without hazard to property on the ground.

[8] In its replication Leading Prospects said that it had no knowledge of whether the aircraft was being operated in contravention of the Regulation at the time of the accident. In the alternative, and in the event of it being found that the helicopter was being operated in contravention of the Regulation, Leading Prospects said that the warranty in the policy relating to compliance with the Regulation was a *"relative*

warranty", and did not have to be complied with if the helicopter was landing. By implication this incorporates an element of reasonableness; that the pilot was only required to act reasonably in complying with the Regulation; and that Tromp avers that when the accident happened he was faced with a situation of emergency and had accordingly acted reasonably.

WHAT REGULATIONS AND WHICH ACT IS APPLICABLE.

[9] There was some disagreement between Leading Prospect and Tromp regarding what regulations or Act is applicable.

[10]

10.1 The starting point is the Aviation Act No. 74 of 1962 which came into force on 21 July 1962 by promulgation in Government Gazette No.102 of 21 July 1962.

10.2 In Government Gazette No. 18286 of 26 September 1997 the Civil Aviation Regulations were promulgated in terms of Section 22 of the Aviation Act. These Regulations are commonly referred to as the 1997 Regulations.

10.3 Government Gazette No. 24017 of 15 November 2002 amended certain parts of the 1997 Regulations including Regulation 91.06.32.

The amendment related only to section 2 of the Regulation which is not relevant to this case.

10.4 In Government Gazette No. 32266 of 27 May 2009 the Civil Aviation Act No. 13 of 2009 was promulgated but did not immediately come into effect.

10.5 In Government Gazette No. 32958 certain sections of the Civil Aviation Act were made effective with effect from 31 March 2010. Simultaneously the Aviation Act was repealed.

10.6 Section 164(1) of the Civil Aviation Act provides that any regulations made under the Aviation Act will remain in force until replaced by an Act of Parliament or regulation made under the Civil Aviation Act.

10.7 In Government Gazette No. 35398 of 1 June 2012 regulations were promulgated under Section 155(1) of the Civil Aviation Act. These regulations repealed the 1997 regulations and are commonly referred to as the 2011 Regulations.

[11] The accident in the present case occurred on 5 September 2011. It is therefore clear that the legislative framework which regulates the accident was the provisions of the Civil Aviation Act No. 13 of 2009 and the 1997 Regulations.

[12] The operative wording of Regulation 91.06.32 is the following:

> *"91.06.32*
>
> *(1) Except when necessary for taking off or landing, or except with prior written approval of the Commissioner, no aircraft-*
>
> *(a) shall be flown over built up arrears or over an open air assembly of persons at height of less than 1000 feet above the highest obstacle, within a radius of 2000 feet from the aircraft;*
>
> *(b) when flown elsewhere and specified in paragraph (a) shall be flown at a height less than 500 feet above the ground or water, unless the flight can be made without hazard or nuisance to persons or property on the ground or water".*

[13] The main issue between Leading Prospects and Centrique is whether the helicopter was being flown at a height of less than 500 feet when it collided with the power lines. The evidence shows that the power lines were less than 500 feet above the ground.

[14] It is therefore, common cause between all of the parties that the helicopter was flying at less than 500 feet when it collided with the power lines.

[15] On the basis that the helicopter was being flown at less than 5000 feet above ground and collided with the power lines it was submitted on behalf of Centrique that Centrique had demonstrated that the warranty in the policy was breached because the Regulation was breached. I agree

[16] The breach of the Regulation was admitted by Leading Prospects's witnesses.

16.1 Leading Prospects called an expert pilot, Mr Mouton as a witness. In his expert summary Mr Mouton said:

> *"The expert witness will conclude that the pilot, Mr Tromp, in his opinion, contravened Civil Air Regulations, which deal with minimum heights and more particularly, with the provisions that a helicopter should not be flown at a height of less than 500 feet".*

During his cross-examination Mr Mouton confirmed that what was stated in his expert summary remained his opinion.

16.2 Mr Grobbelaar was also questioned about the breach of the Regulation. During his cross-examination Mr Mouton's statement regarding his view that the Regulation had been breached was put to Grobbelaar. Grobbelaar initially sought refuge in the fact that the Regulation requires damage to property and when it was pointed out to him that power lines had been damaged the following exchange occurred:

> *"And do you agree that, that is a breach of the Regulation?*
>
> *--- Yes".*

Grobbelaar went on to explain what the difficulty was that Leading Prospects faced. He said that from what he understood it was true, referring to the fact that the Regulation had been breached and explained that *"the whole problem that we sit with here, My Lady is that, Mr Tromp argues ... and I cannot ... have no way of disproving what he says... he says he had an emergency. Since he had an emergency, he had to breach this Regulation and therefore, it is a different story."*

WAS THERE AN EMERGENCY

Mr Tromp did get an opportunity give evidence. He failed to use it. The first issue that needs to be dealt with is what inference must be drawn from the fact that Tromp

Tromp elected not to testify. Tromp was available in court throughout the proceedings and versions were put to witnesses regarding what he would say.

[17] Throughout the cross-examination of witnesses on behalf of Tromp, versions were put relating to what Tromp might say.[1]

[18] The general approach is that where a witness is available to confirm a version and is not called to give evidence the inference is overwhelming that his evidence

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[1] Sonnekus

Transcript, p.76 lines 16-20 : "Ja, the evidence will be that, when the low flying took place and the turn around effected the pilot then ... his intention was to fly to Elliot in front of the convoy. ----Ues, that is correct.

Mouton

Transcript, 125, line 13 – line 18: "Mr Tromp will testify when he comes to the witness stand that, when he received this helicopter, it was not in a clean condition at all. It was filthy. Would you be able to say anything in regard to that, or would you not know? --- M'ladyship, it is not information that I am privileged to".

Transcript, p. 141, lines 18 – 23

"Now, Mr Tromp will testify, when he turned to the airport, his intention was, to land at the airport, after the warning light came on. He turned the nose of the helicopter into the wind, because the wind was coming from Qeenstown to him. That is a good procedure, is that not? ---If the wind was, indeed. But as per my information the wind was, indeed, but as per my information the wind was not coming from that direction, Sir".

Transcript, p. 142, lines 16 – 20

"I do not want to waste mcht time on this Mr Mouton, would you dispute Mr Tromp's evidence if he say, at that point in time, the wind was coming from Queenstown and he was turning his nose into the wind, would you dispute that? --- On grounds of the weather bureau report, yes Sir."

Transcript, p. 142., lines 25 – p.9

"Now, if Mr Tromp tells the court that, after the warning light came on, when he tried to gain height, the light came on and went off when he reduced slightly power. Would you agree that the system of a helicopter, or the warning system indicated that, by drawing more power, by gaining height, was a dangerous exercise at that particular point in time? After the warning light came on? ---M'lady, I can only reduce slight power, you can still climb. You can fly straight and level and not having accurate information, I would not be able to tell you whether he would have had to descend..."

Transcript, p. 146, lines 20 -24

"Mr Tromp will say that the previous morning, or the Saturday, he also got a warning light of the fuel filter and o the Sunday, when the Voetspore team departed from Cape Agulllas, they spent literally more than two hours, trying to start the helicopter".

would have been unfavourable[2]. It is accepted that a similar inference can be drawn if a party fails to give evidence [*Gallant v Dickinson 1950 (2) SA 460 (a) at 685]*. In that case Schreiner JA said:

> *"In the case of the party himself who is available, as was the defendant here, it seems to me that the inference is, at least, obvious and strong that the party and his legal advisers are satisfied that, although he was obviously able to give very material evidence as to the cause of the accident, he could not benefit and might well, because of the facts unknown to himself, damage his case by giving evidence and subjecting himself to cross-examination".*

[19] When more than one inference can be drawn from the fact, and a defendant has elected not to give evidence then the inference to be drawn from the available facts must be the one which is least favourable to the party who fails to call the witness. This point is well made with reference to the Gallant case *supra*, where Schreiner JA said:

> "*It seems fair at all events to say that in an accident case where the defendant was himself the driver of the vehicle the driving of which the plaintiff alleges was negligent and caused the accident, the court is entitled, in the absence of*

Transcript, p. 156, line 15 – p. 157, line 5: "The evidence of both Mr Tromp and the co-pilot Mr Williamson will be that when they flew over the convoy, the low [indistinct] you see, that was, sort of saying goodbye. ... And then they turned back towards Elliot and at stage, they gained quite a lot of height and the next time, when you seem them on the video, they were fairly low, going beyond the convoy, towards the direction of the airfield, or towards the direction of Qeenstown, or the other adjacent township. You have seen that on the footage? --- I have seen that M'lady.
Ja, that was ... when they come back ... it was after the light illuminated and they had this warning light, pertaining to the fuel filter, but obviously you will not be there, you could not say the light did not come up or not? ---No. I was not here and the only evidence was as per the video, M'lady.

[2] *Sumsang v Pim 1918 AD 657 at 662; and Elgin Fireclays Limited v Webb 1947 SA 744 (a) at 50.*

evidence from the defendant, to select out of two alternative explanations of the cause of the accident which are more or less equally open on the evidence, that one which favours the plaintiff as opposed to the defendant".

[20] The reason why Tromp was not called to give evidence was not explained. In my view no explanation was necessary as it is clear from the conflicting reports that Tromp made concerning the accident that had he given evidence he would have been in trouble.

20.1 On 8 September 2011 Tromp completed an accident questionnaire which was submitted to the Civil Aviation Authority ("CAA"). In this questionnaire Tromp was asked to explain the cause of the accident and he said:

> *"Because of the fact of having a warning light again on the fuel filter indication I wanted to return asap to FAQT for further assessment and help."*

20.2 Later he said:

> *"I had a warning on – fuel filter light coming on again and wanted to return to FAQT asap. Turning away from the power lines I had in sight but didn't see new lines above them".*

20.3 In further statement Tromp said:

> *"Still busy climbing out I got the warning light (fuel filter) coming on, so I decided to return to Queenstown (FAQT) in order to phone an engineer once again as I did in Cape Agulhas the previous days(sic)".*

[21] What is significant about the three statements referred to above is that Tromp reports a fuel filter warning light and an intention to return to the Queenstown airfield. There is no mention of any other problem with the helicopter nor is there any mention of an urgent and pressing need for the aircraft to descend close to the ground.

[22] Tromp's earlier statements must be contrasted with the contents of the expert summary that was filed on his behalf. In paragraph 2.4 of the Tromp's expect summary he said:

> "*The witness immediately followed the prescripts of the Pilots Operating Handbook for a Robinson R44 helicopter, and as quickly as possible reduced power and flew to a lower point with the intention of landing on the road. This was the most practical and safest low point in the area. (Translated)".*

[23] The version proffered in Tromp's expert summary is in stark contrast to his earlier versions. Why Tromp would want to land on the road is difficult to understand.

[24] The Pilots Operating Handbook does not require the helicopter to land on the road but instead requires the helicopter to return to the airfield. Reasonable piloting demands that altitude be preserved and the most direct line flown to the airfield. Tromp did neither of these. Instead he caused the helicopter to descend and flew on a track that was at 90 degrees to the most direct to the airfield.

[25] It was submitted on behalf of Centrique that the only reasonable inference to be drawn from Tromp's election not to testify is that he could not give evidence that the fuel filter light had illuminated. No other reasonable inference was submitted to the contrary.

[26] Tromp's counsel sought to rely heavily on Williamson's evidence to prove Tromp's case. Williamson's evidence about the fuel filter light must be assessed in the context of Tromp's failure to testify. It is significant that Willamson was not the pilot and was sitting in the back seat. His view of the control panel must have been obscured. Even if it had not been obscured it was obvious from the evidence of Willamson that he was speculating as to why Tromp flew low. Williamson's evidence can unfortunately not assist this court to determine whether Tromp was faced with an emergency.

[27] Leading Prospects's expert witness, Mouton, testified that he had viewed the video recordings that were taken from inside the helicopter's cockpit and that he had

not seen the fuel filter warning light illuminated at any point in time. This evidence was not contradicted.

[28] Mouton explained what a pilot should do if a fuel filter warning light illuminates and what the helicopter was in fact doing:

28.1 Mouton explained what the Pilots Operating Handbook required of a pilot when the fuel filter warning light illuminates.

28.2 Just before the helicopter struck the power lines it was side slipping i.e it turned its side in its direction of travel. Side slipping is not something to be done when the fuel filter light illuminates.

28.3 If an emergency is encountered a pilot should preserve his altitude so that he can glide to his destination.

28.4 If the fuel filter warning light has illuminated and a pilot wishes to return to the airfield he should select the most direct route and not fly at 90 degrees from the most direct route.

28.5 The helicopter was <u>not</u> in a landing configuration at the time of striking the wires but was instead in a normal flight configuration.

[29] In my view Tromp was not managing an emergency when he hit the power lines. Instead he had dropped the nose of the hilecopter and was powering away after he had allowed the passenger to film the cars below.

[30] The version about the fuel filter warning light seems like a fabrication as it was not confirmed since Tromp did not give evidence.

[31] Even if the fuel filter light had in fact illuminated that did not establish an emergency. This is borne out by the prescribed conduct of a pilot by the Pilot Operating Handbook, and Mouton's evidence that the illumination of the light constituted an incident and not an emergency.

[32] In addition even if it were to be accepted that the fuel filter light had illuminated that was no reason for Tromp to fly at a height of less than 500 feet. The fuel filter light does not justify flying below 500 feet.

[33] The witnesses agreed that the helicopter had to be flown in accordance with the prescripts of the Pilots Operating Handbook.

[34] The Pilots Operating Handbook is an important and useful manual. It contains definitions of "*land immediately*" and "*land as soon as practical*". The definition of "*land as soon as practical*" requires the helicopter to land at the nearest airport or other facility where emergency maintenance may be performed. When dealing with emergency procedures the Pilots Operating Handbook provides that when the fuel filter warning light illuminates then, if there is no other problem, the helicopter should land as soon as practical.

[35] The prescript in the Pilots Operating Handbook requiring the helicopter to land as soon as practical must be contrasted with when the helicopter is required to land immediately. When an immediate landing is called for, the helicopter has to "*land on the nearest area where a safe normal landing can be performed*".

[36] Therefore even if the fuel filter warning light illuminated the helicopter was not required to land immediately. All that was required from Tromp was to return to the airfield. Reasonable piloting would have achieved this by maintaining altitude and flying a direct route to the airfield.

[37] In view of the above I find that Leading Prospects has not made out its case against Centrique. The claim against the first defendant is dismissed.

THE CASE AGAINST THE SECOND DEFENDANT ("TROMP")

[38] Leading Prospect's case against Tromp was, in essence, pleaded as follows:

38.1 Tromp hired the helicopter from Leading Prospects to accompany and provide assistance to a team of persons who undertook the production of a TV film.

38.2 The terms of the partly written, partly oral agreement between Leading Prospects and Tromp were, inter alia, that:

38.2.1 Tromp would at all relevant times comply with civil air regulations and other statutory requirements and good practice expected from pilots, piloting helicopters;

38.2.2 Tromp would exercise the diligence and skill that could reasonably be expected from a prudent helicopter pilot when piloting the helicopter;

38.2.3 Tromp would act without any negligence without causing any hazard or nuisance to persons or property;

38.2.4 Tromp would ensure that he does not breach any of the policy stipulations or any policy warrantees pertaining to the flying of the helicopter, which could compromise the insurance policy between plaintiff and first defendant.

[39] Tromp admitted all the above allegations.

[40] Leading Prospects alleged further that:

40.1 Tromp was in breach of the agreement between him and Leading Prospects in that inter alia.

40.1.1 He contravened Part 91.06.32 of the Civil Air Regulations dealing with minimum heights in that he flew the helicopter at a height of less than 500 feet above the ground and cause a hazard to property on the ground (being the power line)

40.1.2 He breached the policy warrantees pertaining to the safe operation of the helicopter;'

40.1.3 He failed to keep a proper look out

40.1.4 He flew too close to the Eskom power lines.

40.1.5 He failed to avoid the incident when with the exercise of reasonable care and skill he should have done so.

40.1.6 He failed to comply with the policy stipulations of the policy between Leading Prospects and Centrique pertaining to the reasonable care.

[41] Tromp denied the allegations above and also raised two special pleas

[42] The first special plea was to the effect that at the time at the time the plaintiff hired out the helicopter to Tromp the plaintiff did not possess a certificate of registration, there was also no valid airworthiness certificate issued by the authorities of the Civil Air Aviation in respect of the helicopter in favour of the plaintiff.

[43]Tromp contended that since Leading Prospects had hired out the helicopter to Tromp contrary to mandatory terms of the Civil Aviation Regulations, the agreement between Leading Prospects and Terms was invalid , alternatively void as a result of the *par delictum* rule. It was contended, further, that, as a result Leading Prospects was prohibited in law from claiming damages from Tromp on the basis of contract or delict.

[44] In Tromp's second conditional special plea Tromp alleged the following:

45.1. That Leading Prospects failed to issue and invoice or receipt in respect of a cash payment exclusive of VAT made by Tromp to Leading Prospects in terms of a written agreement .

45.2. That the reason for the above was that Leading Prospect's intension was not to disclose the amount of cash to SARS. If that was so the agreement of rental would have been concluded with a purpose contrary to the law.

45.3. In the result the rental agreement was void or voidable and Leading Prospects was prohibited from claiming damages against him.

[46] Tromp's plea on the merits was that Tromp had responded to an emergency or potential emergency caused by a defect in the helicopter. In addition Tromp pleaded that he acted reasonably in the circumstances and exercised reasonable care and skill of a prudent helicopter pilot.

[47] FIRST CONDITIONAL PLEA

[48] It is common cause that Leading Prospects purchased the helicopter from Great South Panelbeaters CC and paid for it on 20 June 2011. The following day Leading Prospects took possession of the helicopter.

[49] Transfer and registration is regulated by Regulation 47.00.10 when was applicable in 2011.

[50] In terms of Regulation 47.00.10 (1) Great South Panelbeaters CC was obliged to notify the commissioner of the transfer of the helicopter within 30 days of such transfer.

[51] In terms of Regulation 47.00.10(3) Leading Prospects was obliged to apply for registration within 30 days from the date of transfer .

[52] Regulation 47.00.10(4) provides that a certificate of registration shall no longer be valid from the 31st day after the date upon when Great South Panelbeaters CC had transferred to Leading Prospects the permanent and unconditional right of possession of the helicopter.

[53] In terms of Regulation 47.00.10 (4) No person shall use the helicopter from the date upon which the certificate registration had become invalid.

On 15 July 2011 a certificate of airworthiness in respect of the helicopter was issued.

On 18 July 2011 Monica Saltmarsh sent an email to Leading Prospects and attached an application for the registration of the aircraft.

[55] Mr Grobbelaar, for Leading Prospects stated that the day after he obtained the application form(i.e. on 19 July 2011) he went to the CAA offices intending to initiate the application for registration. He submitted the complete application form to

Monica. When he told her that he would obtain a letter from the holder of a notarial bond over the helicopter , Standard Bank she told him it would be unacceptable as the CAA would liarse with Standard Bank directly . This would be done to satisfy the CAA that the registration could be proceeded with.

[56] On 7 September 2011 Standard Bank issued discharge of the notarial bond (mortgage) was issued. On 3 October 2011 the certificate of registration in the name of Leading Prospects was issued.

[57] The CAA charged Leading Prospects and found it guilty of having hired out and having allowed pilots to fly the helicopter between 1 September 2011 and 3 October 2011, without a valid certificate of registration.

[58] This court was informed that this matter is subject to a pending appeal and that it is common cause that this court is not bound to the finding of the CAA.

[59] In Absa Insurance brokers(Pty) Ltd v Luttig & Another N.N.O 1997(4) SA 229(SCA) 238, G-H the Court stated that the question that needs to be determined was whether the legislature intended to make in-roads into contractual relationship and whether the wording of the statute is peremptory, or not.

[60] The court also emphasised that the provisions of the Act were there to protect the interests of the public at large.

[61] *In Pottie v Kotze 1954(3) SA 719 (A) at 726 H – 727 A it was stated*

"The usual reason for holding a prohibited act to be invalid is... the fact that recognition of the act by the court will bring about, or give legal sanction to the very situation which the legislature wished to prevent."

[62] *In Schierhout v Minister of Justice 1926 AD 99 The Court stated at page 109;*

"It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect. The rule is stated... so what is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been operates to nullify the act..."

[63] Where a question of a contract is against the law the Court may *mero motu* consider the question whether such act is unlawful. (See Good Gold Jewellery (Pty) Ltd v Brevadau CC 1992(4)) SA 474(WLD) at 479 I Part 185.00.1 under the heading "OFFENCES" clearly determines that:

"A person commits an offence if that person...

(i) Operates or attempts to operate any aircraft in respect of which no valid certificate or valid certification of airworthiness have been issued"

"(m) Contravenes in any manner the provisions of the Act and regulations promulgated in terms of the Act When are administered by the authority (referring to the CAA) and even Part 185.00.1(f) further provides that a person commits an offence if that person ... does or causes or permits to be done caused any Act

contrary to or who fails to comply with, any provision of the regulations or direction given or a prohibition made or a condition imposed in terms thereof'.

[64] The authorities are clear, therefore, that if an Act is prohibited by a statute, such act is void and unenforceable. If a statute is peremptory or if the intention of the legislature is that there is a criminal sanction that such act would be void. (See Metro Western Cape (Pty) Ltd v Ross 1986(3) SA 177(A).

[65] In view of the authorities I am of the view that the agreement between Leading prospects and Tromp cannot stand as it is void.

THE SECOND CONDITIONAL PLEA

[66] The second conditional special plea raised by Tromp is based on the fact that Leading Prospects received cash for the estimated period of 25 hours, and that Grobbelaar, on behalf of Leading Prospects, received an amount of R66 250.00 in cash without issuing a receipt.

[67] Grobberlaar's explanation was that it was a deposit, that he did not add VAT to the amount because the transaction was incomplete at the time.

[68] It was submitted on behalf of Tromp that the purpose of receiving cash in this instance, without VAT was to evade Leading Prospects tax liabilities, thereby, defrauding the South African Revenue Services and the state. It was submitted that the purpose for this transaction was on the part of Leading Prospects , for an illegal purpose. Counsel for Tromp urged this court to _mero motu_ take cognisance of this fact and find that the transaction was against the law and _contra bonis mores_

[67] To support this submission Tromp's counsel relied on the fact that Grobbelaar admitted that to draw cash in such a large amount, was a risk and that a receipt issued by him would be the normal practice. In addition Grobbelaar could not explain what he had done with the money.

[68] I do not think there is any merits in the above submission.

[69] Grobbelaar explained that the reason he did not issue a receipt and did not add VAT to the amount was because the transaction was incomplete. It has not been suggested that this explanation was unreasonable or improbable and I accept the explanation as quite plausible.

[70] In the result the second special plea is dismissed.

THE MERITS OF THE CLAIM AGAINST TROMP.

[70] In the result the second special plea is dismissed.

THE MERITS OF THE CLAIM AGAINST TROMP.

[70] Tromp's defence on the merits can be summarised as follows:

70.1 The helicopter was delivered to Tromp in a bad state. It was not clean and had certain major problems. Tromp phoned Mr Hannes Eksteen, a helicopter engineer on Saturday evening, 3 September 2011 and told him that the fuel filter illuminated, and that the helicopter could not start.

70.2 On Sunday 4 September 2011 Mr Eksteen inspected the helicopter at Cape Agulhas, took the fuel filter off, flushed the system and found contamination in the fuel system namely, a piece of plastic approximately 10 cm long and 1 to 2 mm wide.

70.3 He attended to the starting problem and thereafter took a test flight with Tromp to see if the warning light stayed off and it did that.

[71] Mr Eksteen stated that he could not determine whether there was still contamination in the fuel tank of the helicopter. He stated that the engine was not

[72] Mr Williamson, a qualified helicopter pilot stated that while the helicopter was flying he turned his attention to the inside of the helicopter and saw the fuel filter warning light flashing on and off.

[73] According to Mr Williamson this was an emergency and he assumed that Tromp was returning to Queenstown. They had earlier discussed the fact that if the light came on again they would abandon the trip.

[74] This version sound highly suspect. It is highly unlikely that Tromp, well knowing that the helicopter might have a serious problem, would allow a youngster to get onto the helicopter.

[75] I have already pronounced on the reliability of Mr Williamson's evidence in regarding whether he saw the light flashing on and off. The video taken on the inside of the helicopter does not support this evidence. In any event, Mr Williamson was sitting at the back and it is not clear how he saw the light.

[76] Of concern to me is that an impression sought to be created that Mr Williamson was a co-pilot and that he took an active part in assisting Tromp.

[77] From the evidence it is clear that Mr Williamson was not co-piloting the helicopter. Even if he had been, his version that there was no discussion

pertaining to the re-currance of the fuel light filter warning light and that Tromp simply decided to turn back without a word is so improbable that it falls to be rejected.

[78] The evidence of the expects who emphasised countamination in the fuel system and the difficulty pilots have in seeing power lines does not the assist Tromp.

[79] Tromp's counsel relied on the concession by Mouton that the pilot would not know what the degree of contamination is and what effect it would have on the flying of the helicopter. He would also not know how soon any further the helicopter could go or how soon more serious problems could develop.

[80] Rather than assist Tromp this aspects of Mouton's evidence only serves to support my earlier conclusion that if the helicopter had really serious problems it would not have been flown with a youngster aboard.

[81] Tromp chose not to give evidence to support the version put forward on his behalf. That weighs heavily with me and certainly seals the fate of Tromp's defence, in my view.

[82] Having regard to the evidence as a whole, I am satisfied that Leading Prospects proved that Tromp acted as pleaded in the particulars of claim. He acted negligently, without taking proper care and without due regard to the provisions of the Civil Aviation Regulations. Tromp was flying the helicopter below 500 feet when the accident occurred and there was no emergency at the time.

COSTS

[83] On behalf of Leading Prospects it was submitted that Leading Prospects instituted action against Centrique on the strength of Tromp's assertion that he responded to an emergency and had exercised the necessary care and skill in the circumstances. It was submitted that because Tromp had failed to testify thereby leaving Leading Prospects in the lurch he should be ordered to pay Centrique's costs.

[84] Counsel for Centrique however, submitted that his client could not be left in a position where it could only look to Tromp for recovery of its costs. Centrique's costs, therefore, should be paid by Leading Prospects and Tromp and any amount of costs which Leading Prospects pays to Centrique may be claimed from Tromp.

costs, therefore, should be paid by Leading Prospects and Tromp and any amount of costs which Leading Prospects pays to Centrique may be claimed from Tromp.

[85] I have considered the above submissions and am of the view that while Leading Prospects had a good reason to institute action against Centrique it would prejudice Centrique if it looked to Tromp only for costs. A fair costs order, therefore, would be one where Centrique's costs are paid jointly and severally by both Leading Prospects and Tromp.

[86] In the result I grant the following order:

1. THE CLAIM AGAINST THE FIRST DEFENDANT

   1.1 The plaintiff's claim against the first defendant is dismissed.

2. THE SECOND DEFENDANT'S SPECIAL PLEAS

   2.1 The first special plea by the second defendant is upheld

   2.2 The second special plea by the second defendant is dismissed

3. THE CLAIM AGAINST THE SECOND DEFENDANT ON THE MERITS

   3.1 The plaintiff's claim against the second defendant based on breach of contract is dismissed.

4 COSTS

4.1 The second defendant is ordered to pay the plaintiff's costs inclusive of costs of senior counsel.

4.2 It is ordered that the plaintiff and second defendant pay the first defendant's costs inclusive of costs of the senior counsel jointly and severally.

4.3 The second defendant is ordered to pay the plaintiff any amount of costs which the plaintiff pays to the first defendant.

TM Masipa

Judge of the High Court of South Africa

Gauteng Local Division Pretoria

Counsel for the Paintiff: AF Arnoldi SC

Counsel for the Paintiff: AF Arnoldi SC

Instructed by: Couzyn Hertzog & Horak

Counsel for the 1st Defendant: IP Green SC

Instructed by: Norton Rose South Africa

Counsel for the 2nd Defendant: AJH Bosman SC and WJ SCheepers

Instructed by: Stopforth Swanepoel & Brewis Inc.

Date of Hearing: 11 – 15 November 2013 & 17 February - 19 February 20115

Date of Judgment: 8 April 2015