THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 421/2018

In the matter between:

AFRICA CHARTER AIRLINE CC **APPELLANT**

and

AVISYS AVIATION SYSTEMS CC **RESPONDENT**

Neutral citation: *Africa Charter Airline v AviSys* (421/2018) [2019] ZASCA 16 (22 March 2019)

Coram: Lewis ADP and Saldulker, Van der Merwe and Makgoka JJA and Davis AJA

Heard: 25 February 2019

Delivered: 22 March 2019

Summary: Aviation – interpretation of aircraft maintenance manual – overhaul of main landing gear of aircraft – language, purpose and context of manual indicate obligation to remove cadmium plating – appeal upheld.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Matojane J sitting as court of first instance):

1 The appeal is upheld with costs.
2 The order of the court a quo is set aside and replaced with the following:
'(a) Judgment is granted against the defendant for payment of the amount of R460 000, interest thereon calculated at the prescribed rate *a tempore morae* and costs.
(b) Claim B is dismissed.
(c) The counterclaim is dismissed with costs.'

JUDGMENT

Van der Merwe JA (Lewis ADP and Saldulker and Makgoka JJA and Davis AJA concurring)

[1] The appellant, Africa Charter Airline CC, conducts an aircraft charter business. The respondent, AviSys Aviation Systems CC, services, repairs and overhauls aircraft components. During November 2011, the appellant requested the respondent to provide a quotation for the overhaul of the major components of the main landing gear of a Boeing 737 aircraft belonging to the appellant (the components). The respondent quoted the amount of R550 000 for the work. The appellant accepted the quotation and pursuant thereto, the components were delivered to the respondent. During December 2011, the respondent returned them to the appellant, claiming that it had properly completed the overhaul. By that time, the appellant had, at the request of the respondent, paid the amount of R460 000 in respect of the overhaul to a subcontractor of the respondent.

[2] The main landing gear of a Boeing 737 aircraft is made of high-strength steel. A layer of cadmium, a soft metal, is electroplated onto the steel in order to protect it from

corrosion. The cadmium plating is coated with an epoxy primer, followed by a finishing coat of enamel paint. It is common cause that the respondent did not remove the cadmium plating from the components during the overhaul thereof. This was the source of the dispute between the parties.

[3] The appellant maintained that the respondent was contractually obliged to remove (and re-apply) the cadmium plating during the overhaul. It contended that the respondent's failure to do so constituted a material breach that entitled it to cancel the agreement. It accordingly sued the respondent in the Gauteng Division of the High Court, Johannesburg for repayment of the amount of R460 000 paid to the respondent (claim A) and for consequential damages consisting of alleged loss of profit, in the amount of US$648 000 (claim B). The respondent denied that it was obliged to remove the cadmium plating. It consequently counterclaimed for payment of the outstanding balance of R90 000.

[4] The matter went to trial before Mayat J. Certain issues pertaining to claim B stood over for later determination, an aspect to which I shall return. Mayat J heard the evidence but sadly passed away before judgment could be given. By agreement between the parties and with the approval of the Deputy Judge President, the pleadings and a transcript of the evidence were placed before Matojane J. He heard argument and found for the respondent. He therefore allowed the respondent's counterclaim with costs. Although the judgment did not say so expressly, it must be understood as having dismissed both claim A and claim B with costs. Matojane J granted leave to the appellant to appeal to this court. As I have indicated, the principal issue in the appeal is whether the respondent had a contractual obligation to remove the cadmium plating during the overhaul of the components.

[5] It is common cause that the overhaul was subject to the provisions of a written agreement entitled 'Maintenance Support Agreement' entered into between the parties on 18 November 2011 (the maintenance agreement). Clause 2.1 of the maintenance agreement provided:

'The services shall be performed in accordance with the Component Owner / Operator specifications and approved Maintenance Technical Documentation. Major technical problems will be rectified after consultation with the Component Owner / Operator.'

Clause 11 thereof provided, *inter alia*, as follows:

'Should AviSys maintenance not comply with the regulations of the relevant Civil Aviation Authority, this Agreement terminates forthwith.'

[6] The regulations of the relevant Civil Aviation Authority are the Civil Aviation Regulations published by Government Notice R1219 of 20 September 1977. Regulation 43.02.3 provides *inter alia* that any person who carries out maintenance on an aircraft or aircraft component shall use methods, techniques and practices which are prescribed in the current manufacturer's maintenance manual and in accordance with 'Document SA-CATS-GMR'. Paragraph 2(1) of Part 43.02.5 of this document provides:

'**Overhauls: General**

(1) Any overhaul must be carried out in accordance with the manufacturer's current overhaul manuals. Mandatory Airworthiness Directives, Service Bulletins, Service Letters and Service Instructions must be embodied as directed.'

[7] The parties are in agreement that in terms of these provisions, the overhaul of the components had to be performed in accordance with the Boeing Component Maintenance Manual (CMM). The CMM makes reference to the applicable provisions of the Boeing Standard Overhaul Practices Manual (SOPM). Two sections of chapter 32 of the CMM are of particular relevance and the parties placed the then current versions thereof before the court a quo. They are section 32-00-05 and section 32-11-11.

[8] Section 32-00-05 is headed 'REPAIR OF HIGH-STRENGTH STEEL LANDING GEAR PARTS'. The section commences with the following:

'**1 <u>Description And Operation</u>**

A The procedures in this subject are for alloy steel landing gear parts heat-treated 180 ksi or above.

B The data is general. It is not about specific parts or installations. Use this data as a guide to help you write minimum standards.

C These procedures refer to the more general procedures in the Standard Overhaul Practices Manual (Chapter 20), document D6-51702. If the procedures in this subject do not agree with those in the Standard Overhaul Practices Manual, use the procedures in this subject.

D These procedures start with parts which are removed from the airplane and disassembled for overhaul, but not yet put through shop processes such as stress relief, finish removal or material removal. Refer to the applicable overhaul instructions for the details about specific repairs or refinish for a part. If the procedures in this subject do not agree with those in the overhaul instructions use the procedures in the overhaul instructions.

E These procedures are typical for all parts. The repair instructions for the specific part will tell you when to use these procedures.'

It is undisputed that the steel parts of the components fell within para 1A above. Cadmium plating is prescribed for parts heated to 180-220 ksi (kilopounds per square inch) tensile strength and cadmium-titanium plating for parts heated to 220-300 ksi.

[9] This is followed by a diagrammatic flow chart setting out a sequence of basic repair procedures. The first step prescribed by the flow chart is to disassemble and clean component parts. The second step is 'REMOVE ENAMEL, PRIMER, CADMIUM PLATING OR CADMIUM-TITANIUM PLATING, (SOPM 20-30-02)'. SOPM 20-30-02 deals with how the stripping of protective finishes should be done.

[10] After prescribing a number of steps, including procedures pertaining to analysis of surface defects found, the flow chart provides for the re-application of cadmium plating or cadmium-titanium plating, depending on which is applicable. This is followed, interspersed with other procedures, by instructions to apply a primer and an enamel topcoat. Predictably the last step of the flow chart is to re-assemble components.

[11] Section 32-11-11 is headed 'MAIN GEAR SHOCK STRUT ASSEMBLY'. The left and right shock strut assemblies are the major components of the main landing gear. Each shock strut assembly in turn consists of a shock strut and various subsidiary parts. The components included the shock struts and, although this is not very clear from the evidence, at least the upper and lower torsion links of both shock strut assemblies.

[12] This section provides step by step for detailed procedures for the overhaul of a shock strut assembly. Section 32-11-11 contains no procedure pertaining to the cadmium plating on the high-strength steel parts of the landing gear. However, under the heading 'Reference', section 32-11-11 makes specific reference to section 32-00-

05 and under the heading ‘General’ it states: ‘Refer to SOPM 20-10-01 and CMM 32-00-05 for repair and refinish of high strength steel parts’.

[13] As I shall show, the appellant also relied on a Boeing Service Letter dated 23 April 2002 (the service letter). The service letter described three instances where the fracture of main landing gear parts had occurred. The service letter explained that in all three instances, corrosion pits had initiated cracks which led to the fractures. It stated that the root cause of the corrosion pits and eventual fractures was that cadmium-titanium plating had not been done according to engineering requirements, that the plating had been thin or non-existent and had not been completely stripped during overhaul. In terms of the service letter, Boeing concluded as follows:

‘Boeing has concluded that gear overhaul must result in the required cadmium thickness and post-plate chromate conversion coating. Otherwise, the overhaul will not meet Boeing design or overhaul requirements, and will not provide adequate corrosion protection for service between scheduled gear overhauls. Therefore, complete removal and replacement of the cadmium plating is needed to prevent finish degradation and accelerated corrosion in service.’

[14] The service letter also stated that its purpose was to advise operators: (a) that the overhaul of any high-strength steel landing gear component should include complete stripping of cadmium; and (b) that they should ensure that their overhaul shops or overhaul agencies completely strip cadmium during overhaul.

[15] The appellant put forward three alternative grounds for the contention that the respondent was obliged to remove the cadmium during the overhaul of the components. Firstly it said that a proper interpretation of sections 32-00-05 and 32-11-11 of the CMM established this obligation. Its second ground was that the service letter had been incorporated into the maintenance agreement and that its terms provided for the alleged obligation. Thirdly, the appellant relied on a tacit or implied term to this effect.

[16] The respondent denied that an express, tacit or implied term of the maintenance agreement had obliged it to strip the cadmium plating. In particular its case was that as a matter of interpretation of the CMM, only section 32-11-11 was applicable to the overhaul of the components, to the exclusion of section 32-00-05. It pointed out that it was common cause that the service letter had not been made available to the

respondent and alleged that it had therefore not been ‘embodied’ into the maintenance agreement. The respondent also took the stance that the service letter, in any event, only made recommendations and had no binding effect.

[17] I therefore turn to the interpretation of sections 32-00-05 and 32-11-11 of the CMM. It is well established that this exercise entails giving meaning to the words used within the context in which they were used and in which the contract was concluded. As Lewis JA said in *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* [2015] ZASCA 111; 2016 (1) SA 518 (SCA) para 28:

‘A court must examine all the facts – the context – in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing.’

The context includes the purpose of the document. And contractual provisions must be interpreted so as to give them a commercially sensible meaning. See *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA) paras 24-25.

[18] The take-off and landing of an aeroplane are potentially very dangerous manoeuvres. Therefore, the main landing gear of an aircraft is a critical component thereof. Malfunctioning thereof could have disastrous consequences. The main landing gear of a Boeing 737 aircraft is subjected to tremendous stress. It supports the +/- 55 ton aircraft during take-off and during flight it is subjected to temperatures as low as minus 55°C. During landing it carries the full weight of the aircraft and its load at ground speeds of up to 200 km/h. This also generates high temperatures. All of this may take place in wet conditions. For these reasons the landing gear has to be regularly overhauled to ensure its safe functioning. This is the purpose of a maintenance and overhaul manual such as the CMM. Chapter 32 of the CMM must therefore be interpreted in the context of the need to ensure the safe functioning of the main landing gear at all times.

[19] The service letter illustrated the consequences of defective cadmium plating. And expert evidence at the trial explained that the failure to remove the cadmium plating during the overhaul, may lead to the non-detection of corrosion pits or cracks caused by the extreme stresses that the landing gear is subjected to. Therefore, the context

provides good reasons for the removal of the cadmium plating during the overhaul of main landing gear components.

[20] In my view section 32-00-05 and section 32-11-11 should be read together. Section 32-00-05 provides for general procedures to be followed during the overhaul of all high-strength steel landing gear parts. This meaning is clear from the provisions of paras 1A, 1B, 1C and the first sentences of paras 1D and 1E of section 32-00-05 quoted in para 8 above. The generally prescribed procedures are complemented by sections containing 'details about specific repairs or refinish for a part' (para 1D), such as section 32-11-11. Only if such specific procedures differ from the general procedures, will the specific procedures prevail, in terms of the last sentence of para 1D. The last sentence of para 1E must therefore mean what it says, namely that the specific sections will tell the operator 'when' (not if) the general procedures are to be used.

[21] There are no contradictions between sections 32-00-05 and 32-11-11 in respect of cadmium plating. Section 32-11-11 contains no procedures in respect of cadmium plating of the high-strength steel parts of a main gear shock strut assembly. Instead it refers specifically to section 32-00-05 in this regard.

[22] If only section 32-11-11 was applicable, the cadmium plating had to be ignored during the overhaul of the components. Section 32-11-11 does not even prescribe inspection of the cadmium plating, let alone procedures to deal with visibly damaged cadmium plating. Even though the cadmium plating may conceal corrosion pits and cracks, the respondent's interpretation would have it that nothing had to be done in respect of the cadmium plating. This is absurd. The appellant's interpretation, on the other hand, makes perfect sense. By the time that one reaches section 32-11-11, the cadmium plating would have been removed in terms of the flow chart in section 32-00-05 and the steel would be exposed for proper inspection.

[23] To summarise, the respondent's interpretation violates the language of these sections, does not fit into the context and leads to an insensible result. I find that the respondent was obliged to remove and re-apply the cadmium plating on the components. In the result the respondent's protestation that it did not include the costs

hereof in its quotation, is to no avail. It follows that the appellant was entitled to cancellation of the agreement and refund of the amount of R460 000.

[24] For these reasons the court a quo should have granted judgment for the appellant on claim A with costs and should have dismissed the counterclaim with costs. It follows that it is not necessary to consider the appellant's aforesaid second and third grounds.

[25] It remains to deal with claim B. The circumstances of this matter again illustrate why careful thought should be given to the formulation of a separation of issues under Uniform rule 33(4). The failure to do so may cause the leading of unnecessary evidence or the duplication of evidence, with resultant waste of costs and scarce judicial resources. More often than not such failure will result in unnecessary delay of the finalisation of the matter, contrary to the interests of justice.

[26] In para 25 of its particulars of claim the appellant alleged that at the time of the conclusion of the maintenance agreement, it was in the contemplation of the parties that the appellant would suffer damages in the event of breach of the maintenance agreement by the respondent or the failure by the respondent to render the maintenance services to the appellant in terms thereof. (This allegation did not, of course, go far enough. The appellant had to allege that the special damages that it claimed were within the contemplation of the parties at the time. See *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A).) In para 26 the appellant pleaded that as a result of the respondent's breach of the maintenance agreement, the appellant was unable to '. . . utilise the aircraft for its intended commercial purposes, i.e. it was not able to hire out the aircraft'. Paragraph 27 set out the calculation of the alleged damages, namely a loss of profit of US$7 200 per day for a period of 90 days. Paragraph 29 merely stated that despite demand, the respondent failed to make payment of this amount to the appellant.

[27] Clause 8 of the maintenance agreement inter alia provided that the respondent would not be liable for any consequential damages. In an attempt to avoid the consequences of this term, the appellant averred five grounds upon which clause 8 was supposedly '. . . unenforceable, *contra bones mores* and against public policy'.

These grounds were contained in para 28 of the particulars of claim. Paragraph 28.5 alleged that '[i]t is unconscionable that the defendant can avoid liability in the light of all the circumstances'.

[28] The parties agreed that paras 27, 28.5 and 29 stand over for later determination. As a result, the court a quo was called upon to decide the factual issues in paras 25 and 26 of the particulars of claim, and some of the reasons for the alleged unenforceability of clause 8, despite the fact that upon the postponed final determination of the validity of clause 8 it could have been found to preclude claim B. This resulted in the potential of unnecessary evidence and the wholly undesirable piecemeal determination of the enforceability of a contractual provision.

[29] That these consequences did not eventuate, was fortuitous and not the design of the parties. Claim B had to fail for the simple reason that the appellant did not prove para 26 of the particulars of claim. The sole member of the appellant testified that the main landing gear of another aircraft had been fitted to the aeroplane in question, allowing the latter to continue flying.

[30] Despite the failure of claim B, the appellant is entitled to its costs in the court a quo and on appeal.

[31] In the result the following order is issued:

1 The appeal is upheld with costs.

2 The order of the court a quo is set aside and replaced with the following:

'(a) Judgment is granted against the defendant for payment of the amount of R460 000, interest thereon calculated at the prescribed rate *a tempore morae* and costs.

(b) Claim B is dismissed.

(c) The counterclaim is dismissed with costs.'

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C H G van der Merwe

Judge of Appeal

APPEARANCES

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