Corbett CJ, Milne JA, F H Grosskopf JA and Van Coller AJA concurred.

First Appellant's Attorneys: *State Attorneys*, Pretoria and Bloemfontein. Second Appellant's Attorneys: *Couzyn, Hertzog & Horak*, Pretoria; *Honey & Partners*, Bloemfontein. Respondent's Attorneys: *Rooth & Wessels*, Pretoria; *Rosendorff & Reitz Barry*, Bloemfontein.

THE SOUTH AFRICAN LAW REPORTS

DIE SUID-AFRIKAANSE HOFVERSLAE

DECEMBER 1991 (4)

BAYER SOUTH AFRICA (PTY) LTD v FROST

APPELLATE DIVISION

CORBETT CJ, HEFER JA, KUMLEBEN JA, FRIEDMAN JA and PREISS AJA

1991 May 13; August 15

Negligence—Liability for—Negligent misstatement causing pure economic loss—Negligent misstatement inducing contract—In principle, negligent misstatement inducing person to enter into contract may, depending upon circumstances, give rise to delictual claim for damages at the suit of person to whom misstatement made—To avert danger of limitless liability and to keep cause of action within reasonable bounds, Court has duty to (a) *decide whether, on facts of case, there rested upon defendant a legal duty not to make misstatement to plaintiff and whether defendant, in light of circumstances, exercised reasonable care to ascertain correctness of statement; and* (b) *give proper attention to nature of misstatement and interpretation thereof, and to question of causation.*

(*Per* Corbett CJ; Hefer JA, Kumleben JA, Friedman JA and Preiss AJA concurring): In terms of the decision in *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) a delictual action for damages is available to a plaintiff who can establish (i) that the defendant, or someone for whom the defendant is vicariously liable, made a misstatement to the plaintiff; (ii) that in making this misstatement the person concerned acted *(a)* negligently, and *(b)* unlawfully; (iii) that the misstatement caused the plaintiff to sustain loss; and (iv) that the damages claimed represent proper compensation for such loss. In principle there is no good reason why, in the recognition of such a cause of action based upon negligent misstatement, any distinction should be drawn between a misstatement made which induces a contract and one made outside the contractual sphere. If justice requires a remedy for a negligent misstatement made by and to persons who are not in any contractual relationship, then justice equally requires that there be a remedy for a negligent misstatement which is made by one contracting party to the other and which induces the contract. The law should provide adequate protection for persons induced to contract by a negligent misstatement emanating from the other

contracting party and not incorporated as a term of the contract; and in many instances this can only be done by granting the party concerned compensation for consequential loss suffered as a result of the misstatement.

Accordingly and in principle, a negligent misstatement which induces a person to enter into a contract may, depending upon the circumstances, give rise to a delictual claim for damages at the suit of the person to whom it was made. The circumstances will determine the vital issues of unlawfulness and whether there is a causal connection between the making of the misstatement and the loss suffered by the plaintiff. In order to avert the danger of limitless liability and to keep the cause of action within reasonable bounds, the Court has a duty to *(a)* decide whether, on the facts of the case, there rested upon the defendant a legal duty not to make a misstatement to the plaintiff (or whether the making of the statement was in breach of such duty and, therefore, unlawful) and whether the defendant, in the light of the circumstances, exercised reasonable care to ascertain the correctness of his statement; and *(b)* give proper attention to the nature of the misstatement and the interpretation thereof, and to the question of causation.

The respondent was the lessee of three farms, one of which was Jasonskloof. The cultivated land on Jasonskloof comprised eight vineyards and six 'other lands' on which cash crops were raised. The vineyards and other lands were intermingled, and in some instances lay adjacent to one another. The proper maintenance of the vineyards required that weeds growing between the vines be eliminated. From 1980, the weeds were eliminated by using herbicides sprayed downwards from a boom attached to a tractor at knee-height. The time taken for the application of herbicide to the vineyards on all three farms by this method was approximately one month. In 1985 the respondent decided to use a new product, 'Sting', marketed by the appellant, and to have the herbicides sprayed onto his vineyards from the air by means of a helicopter. During the spraying operation, which had taken place on 17 August 1985, certain amounts of Sting landed on the onion and wheat crops growing on the other lands at Jasonskloof, causing severe damage, quantified by agreement at R55 000.

The respondent instituted action against the appellant in a Provincial Division, claiming in respect of the damage to his crops. One of the causes of action pleaded was that he had been induced to use Sting on his vineyards, applied from the air by helicopter, by an unlawful and negligent misstatement made by certain of the appellant's employees, acting as the appellant's authorised representatives. The respondent had pleaded that the appellant's duly authorised representatives, one W and one T, acting in the course of their employment with the appellant, and in order to induce the respondent to enter into the contract for the supply and application of Sting to the respondent's vineyards, had represented to the respondent's manager, one L, and respondent's son, both acting on behalf of the respondent, that Sting could suitably be applied from the air by helicopter without causing damage to the cash crops on the adjacent land. More particularly, T, as the appellant's authorised representative, had introduced Sting to farmers, including the respondent's authorised representative, L, at a meeting on 30 June by *(a)* representing that the best method of applying Sting was from a helicopter; *(b)* representing that if Sting were so applied there would be a clear-cut line ('afsnylyn') which would prevent adjacent crops being damaged by that method of application and that, although the cut-off line would not be a straight line, it would be not more than three to five metres from the edge of the vineyard being sprayed; *(c)* representing that appellant would arrange everything with regard to such application; and *(d)* failing to indicate any risk of damage to adjacent crops which could arise from application by helicopter, thereby representing that there was no such risk. It was argued that, by reason of the aforegoing representations, the appellant had been under a legal duty to ensure that such representations were correct; and that the respondent had been induced to apply the Sting purchased by him by means of a helicopter, something he would not otherwise have done. Since the representations had not been correct and since they had been a direct and/or foreseeable cause of the damage suffered by the respondent, which damage had arisen because the appellant, in breach of the aforesaid legal duty, unlawfully and negligently had made the aforesaid representations without ensuring that they were correct and/or feasible, the appellant had

been legally liable to compensate the respondent for the loss he had suffered. The action succeeded and damages in the agreed amount were awarded to the respondent.

On appeal, after finding that, in principle, an action in delict was available to a person who had been induced to enter into a contract as a consequence of a negligent misstatement, the Court (*per* Corbett CJ; Friedman JA and Preiss AJA concurring) dealt with the following issues: (1) whether the appellant's representatives had made the statements attributed to them in the respondent's pleadings; (2) whether such statements had materially been false; (3) whether there had rested upon the appellant's representatives a legal duty to take reasonable steps to ensure that the statements made were correct (this being pertinent to the question of unlawfulness); (4) whether the appellant's representatives had failed to carry out that legal duty, i e had acted negligently in the making of the statements; and (5) if the appellant's representatives negligently had failed in the carrying out of the legal duty referred to in (3) above, whether such failure had caused the respondent's loss.

As to the representation ((1) above), the evidence of L, the respondent's authorised representative, was that he had first heard about Sting early in 1985 when W had visited the farm; and that on the respondent's instructions he had attended the farmers' meeting on 30 June 1985 at which T, the appellant's technical advisor in the area, had addressed the meeting on the merits of Sting, had stated that it could safely be sprayed from the air by helicopter and had demonstrated its application and effectiveness by means of photographic slides. With reference to one of the slides W had pointed to the cut-off line along the edge of the area of application and had stated that the appellant had done tests to demonstrate how accurately Sting could be sprayed and controlled where there were adjacent crops. This latter point being of particular importance with regard to Jasonskloof, L had asked W after the presentation what the maximum distance was over which damage could be expected outside the vineyard being sprayed. T had reiterated that although it would not be a straight line, the cut-off line would be no more than three to five metres beyond the edge of the vineyard being sprayed. L regarded this as the most important statement made that evening. T had also informed the farmers that the appellant would make all the necessary arrangements for the application of Sting by helicopter, and that all that farmers would have to do would be to provide persons to act as markers for the guidance of the helicopter pilot during spraying operations. The respondent remained concerned about possible damage to cash crops lying adjacent to the vineyards at Jasonskloof. W was therefore taken around the farm by L and was shown the cash crops adjacent to the vineyards. W assured L that there was no cause for concern and reiterated T's assertion that there would be a cut-off line of three to five metres from the edge of the vineyard. Furthermore, W stated that 'they' would be present at the spraying operation and would make all arrangements. L had understood this to mean that the appellant's employees would be in charge of the entire spraying operation and would exercise control over the mixing of Sting and its application. The spraying operation took place on 17 August 1985, after W had checked that weather conditions were fine and still. As far as L was concerned, W was in charge that day: he had instructed L in regard to the transportation and placing of markers and the helicopter pilot in regard to the spraying operations. The respondent's son, who had been present at Jasonskloof that morning, confirmed L's evidence in this regard.

Held (*per* Corbett CJ; Friedman JA and Preiss AJA concurring), as to the representation, that, in view of L's evidence, and in the absence of any evidence from T or W to controvert what L had said, the representation pleaded by the respondent had been established.

Held, further, as to whether the appellant's representatives had undertaken to supervise and control the spraying operation (which the appellant had denied), that, although the evidence had not established that the words 'supervise' and 'control' had expressly been used in the contractual discussions, it had clearly been implicit in what had been said that the appellant would supervise and control the operation.

Held, further, that the appellant's employees had, or had purported to have, know-how and experience concerning the application of Sting from the air, whereas the respondent and his employees had none and had not been in a position to control the operation.

Held, further, that, on the evidence, the role assumed and played by W had established that W had in fact supervised the spraying operation.

Held, further, that the falsity of the representation could be deduced from the actual damage to the cash crops (it being evident that, in order to cause the damage sustained, some of the Sting had to have fallen up to 100 metres and more from the edge of the vineyards); from the evidence that the helicopter pilot had performed his duties satisfactorily; from the evidence of the agricultural meteorologist as to 'drift'; and from the concession by the appellant's expert witness that the damage to the cash crops could be attributed to 'drift of some form or another'.

Held, further, that the following facts and circumstances had placed upon the appellant a legal duty, before making the representation, to take reasonable steps to ensure that it had been correct: *(a)* the contractual relationship between the parties and the fact that the representation had been material and had induced the respondent to purchase the Sting and to contract to have it applied from the air by helicopter; *(b)* the circumstances under which the representation, especially as to the 'cut-off line', had initially been made by T and repeated by W must have made it obvious to them that the respondent would place reliance upon what he had been told, and that the correctness of the representation would be of vital importance to him and that if it were incorrect the execution of the contract could cause serious damage to him; and *(c)* the representation had related to technical matters concerning a new product about which the respondent, as a lay customer, would necessarily have been ignorant and the appellant, as distributor, would or should have been knowledgeable.

Held, further, that a failure by the appellant to take reasonable steps to ensure the accuracy of its representations would consequently render its conduct unlawful.

Held, further, as to the issue of negligence, that, since it had appeared from the evidence of a technical advisor in the appellant's employ that it was untrue that, in applying Sting from the air, there would be a definite cut-off line, and that, in fact, no tests had been conducted to determine drift action in the case of aerial application, the appellant's representatives had had no reasonable basis for making the representation and that their actions in so doing had been negligent.

Held, further, as to causation, that it had clearly been established that, but for the misrepresentation made by the appellant's representatives, the respondent would not have contracted for the application of Sting from the air by helicopter and would consequently not have sustained damage to his cash crops caused by its aerial application. The appeal was accordingly dismissed.

The decision in the Cape Provincial Division in *Frost v Bayer South Africa (Pty) Ltd* confirmed.

Appeal from a decision in the Cape Provincial Division (Hodes AJ). The facts appear from the judgment of Corbett CJ.

L G Bowman SC (with him *D J du Toit*) for the appellant referred to the following authorities: As to whether a delictual action for damages on the grounds of a negligent misstatement inducing a contract is available, see *Bayer South Africa (Pty) Ltd and W P Co-Operative Ltd v Viljoen*, unreported (Appellate Division, 28 September 1989); *Herschel v Mrupe* 1954 (3) SA 464 (A); *Hamman v Moolman* 1968 (4) SA 340 (A), especially at 348; *Latham and Another v Sher and Another* 1974 (4) SA 684 (W) at 695–6; *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A); Christie *The Law of Contract in South Africa* at 296–8; *Kern Trust (Edms) Bpk v Hurter* 1981 (3) SA 607 (C), approved in *Auto-Roma (Pty) Ltd v Farm Equipment Actions (Pty) Ltd* 1984 (3) SA 480 (Z) at 486G–H; *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A); *Ericsen v Germie Motors (Edms) Bpk* 1986 (4) SA 67 (A) at 91E–G. As to the legal liability of a distributor, see Mackeurtan *Sale of Goods in South Africa* 5th ed at 162–3; *Holmdene Brick Works (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 682, 683, 688; *Kroonstad Westelike Boere Ko-operatiewe Vereniging Bpk v Botha and Another* 1964 (3) SA 561 (A) at 571. As to the respondent's alternative claim based on delict, see *Lillicrap, Wassenaar and Partners* (*supra*); *Transvaal and Rhodesian Estates Ltd v Golding* 1917 AD 18; *Kriegler v Minitzer and Another* 1949 (4) SA 821 (A). As to respondent's further alternative claim based on contract, see *Knowds v Administrateur, Kaap* 1981 (1) SA 544 (C); *Frank v Barclays National Bank Ltd* 1983 (3) SA 619 (A) at 629 *et seq*; *Schroeder v Vakansieburo (Edms) Bpk* 1970 (3) SA 240 (T); *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531–3; *Christie* (*op cit* at 156–62).

R S van Riet (with him Ms *B van der Vyver*) for the respondent referred to the following authorities (the heads of argument having been drawn by *A J Nelson* and Ms *B van der Vyver*): As to the claim based on breach of contract, see De Wet and Yeats *Kontraktereg en Handelsreg* 4th ed at 28; Christie *The Law of Contract in South Africa* at 20; *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 526A–C. As to the claim based on the fact that the appellant was a merchant vendor, see *Kroonstad Westelike Boere Ko-operatiewe Vereniging Bpk v Botha and Another* 1964 (3) SA 561 (A) at 571E–H; *Holmdene Brick Works (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A); Mackeurtan *Sale of Goods in South Africa* at 51, 134; *Bower v Sparks, Young and Farmers Meat Industries Ltd* 1936 NPD 1; *Vlotman v Buysell* 1946 NPD 412; *Spiers Brothers v Massey Harris and Co (SA) Ltd* 1931 NPD 377 at 382; *Holden and Co v Morton and Co* 1917 EDL 210 at 216; Norman *Purchase and Sale in South Africa* at 358. As to the claim based on negligent misrepresentation, see *De Wet and Yeats* (*op cit* at 43); *Kern Trust (Edms) Bpk v Hurter* 1981 (3) SA 607 (C) at 613E–G; *Herschel v Mrupe* 1954 (3) SA 464 (A); *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) at 833A–C; *Greenfield Engineering Works (Pty) Ltd v NCR Construction (Pty) Ltd* 1978 (4) SA 901 (N) at 916; Kerr *Law of Contract* at 210–13; Prosser *Law of Torts* 4th ed at 699; *International Products Co v Erie Railway Co* (1927) 56 ALR 1377 at 1381; *Hamman v Moolman* 1968 (4) SA 340 (A) at 348D–H, 349E; *Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 500G–501H; *Paradine v Jane* (1647) 82 ER 897; *Peters, Flamman & Co v Kokstad Municipality* 1919 AD 427; *E G Electric Co (Pty) Ltd v Franklin* 1979 (2) SA 702 (E). As to the delictual claim based on negligent conduct, see *Lillicrap, Wassenaar & Partners* (*supra* at 498C–D); the *Administrateur, Natal* case *supra*; *Van Wyk v Lewis* 1924 AD 438; Van der Walt *Law of Delict* at 70; Lee and Honoré *SA Law of Obligations* 2nd ed at 203 s 40(iii).

Cur adv vult.

Postea (August 15).

Corbett CJ: During the period relevant to these proceedings the respondent, Mr Hamilton Hylton Frost, was the lessee of three farms in the Villiersdorp district known as Jasonskloof, Ratelsfontein and Kykuit. The farms Jasonskloof and Ratelsfontein were registered in the name of a private company in which the respondent and his wife held all the shares; while Kykuit belonged to respondent's son, Mr William Peter Frost

('Frost Jnr'). The day-to-day management of the farms was entrusted by respondent, who lived at Kuilsriver, to Frost Jnr and Mr Lodewyk la Grange. La Grange looked after Jasonskloof and Ratelsfontein and Frost Jnr managed Kykuit. Respondent, nevertheless, took an active part in guiding and supervising the farming operations and each Wednesday would travel to Villiersdorp in order to meet with Frost Jnr and La Grange on one or other of the farms. At these meetings the farming activities would be thoroughly discussed and decisions taken as to future action and the running of the farms generally. Nothing was done on the farms without respondent's knowledge and approval.

This case is concerned particularly with the farm Jasonskloof. The property is 218 hectares in extent. It has its own water supply and a number of storage dams are located on the farm. Portion of the farm consists of cultivated lands under irrigation. Some of these are laid out as vineyards; others are used for the raising of cash crops such as wheat and onions (for convenience I shall refer to the latter as 'the other lands'). Viewed on plan, all these lands present a patchwork. The lands differ greatly in size, but are mostly relatively small. There are eight separate vineyards and six other lands. The vineyards and the other lands are intermingled and in some instances lie adjacent, or virtually adjacent, to one another. In evidence the Afrikaans term 'lappiesgrond' was aptly used to describe the general lay-out of the lands.

The proper maintenance of a vineyard requires that the weeds which grow between the vines should as far as possible be eliminated. This is undertaken every year during the months of July/August/September. In earlier days weed elimination was done partly by hand and partly by using a disc plough, but more recently farmers have converted to the use of chemical herbicides. Respondent did so in 1980. The herbicides are applied before the budding of the vines. The poison consequently kills the weeds but has no effect upon the vines. From the start respondent applied the herbicide by means of an apparatus consisting of a boom, fitted with nozzles, attached to the front of a tractor and connected by a pipe to a tank containing the herbicide attached to the back of the tractor. The tractor moved through the vineyards and the herbicide was sprayed downwards by means of the boom from about knee-height. The herbicide used was a mixture of Reglone and Gramaxone, produced by a manufacturer referred to in the evidence as 'FBC'. The time taken for the application of herbicide to the vineyards on all three farms by this method was approximately one month. This period included days when the winter rains rendered the vineyards, or some of them, too wet for the tractor to operate.

In 1985, in circumstances which I shall describe in more detail later, respondent decided to change to a new herbicide marketed by the appellant and known as 'Sting', and also to have the herbicide sprayed onto his vineyards from the air by means of a helicopter. This was done on 17 August 1985. In the course of this operation (this is common cause) certain amounts of Sting came into contact with onions and wheat growing on the other lands on the farm Jasonskloof and severely damaged these crops. The resultant damages have been quantified, by agreement, in the sum of R55 000.

Some time thereafter respondent instituted an action against appellant in the Cape Provincial Division, claiming damages in respect of the loss caused to his crops by the Sting herbicide. Four different (alternative) causes of action were pleaded, one of which was that the respondent had been induced to use Sting on his vineyards, applied from the air by helicopter, by an unlawful and negligent misstatement made by certain of appellant's employees, acting as appellant's authorised representatives. The matter came to trial before Hodes AJ, who found for the respondent on this cause of action. He gave judgment in the agreed sum of R55 000 and granted certain ancillary relief, including interest and costs of suit. With leave from the trial Judge appellant now appeals to this Court against the whole of the judgment and the orders for the payment of damages, interest and costs.

Much of the argument before us focussed on the other alternative causes of action, but because of the view which I take of the matter it is not necessary to discuss them: I shall concentrate on that based on negligent misstatement. In this regard respondent pleaded that during August 1985 respondent, duly represented by La Grange, and appellant, duly represented by one P de Wet, concluded an oral agreement in terms of which (i) appellant sold a systemic herbicide known as Sting to the respondent for the purpose of spraying all the vineyards on the farms Jasonskloof, Ratelfontein and Kykuit; (ii) appellant undertook to make all the arrangements in order to apply the Sting from the air by means of a helicopter; (iii) appellant undertook to exercise the necessary supervision and control over the mixing and application of the Sting in order, *inter alia*, to ensure that cash crops on other lands were not damaged; and (iv) respondent accepted responsibility for the purchase price of the Sting, as well as the reasonable cost of its application, payment thereof to be made by the debiting of respondent's account with the local agricultural co-operative society. (In the event the total cost of the Sting supplied appears to have been about R3 500.)

Respondent went on to plead (reading para 6 of the particulars of claim together with further particulars given) that during the negotiations leading up to the conclusion of this contract appellant's duly authorised representatives, De Wet and a Mr H du Toit, acting in the course of their employment by appellant and in order to induce respondent to enter into the contract, represented to La Grange and Frost Jnr (both acting on behalf of the respondent) that Sting was suitable to be applied from the air by means of a helicopter and that this could be done without causing damage to cash crops on adjacent lands. In particular (and without derogating from the aforegoing) appellant's duly authorised representative, Du Toit, introduced Sting to farmers, including respondent's authorised representative, La Grange, at a farmers' meeting held at the Brandvlei Kelders, Worcester, on 30 June 1985 by:

(a) representing that the best method of applying Sting was from a helicopter;

(b) representing that if Sting was so applied there would be a clear cut-off line ('afsnylyn') which would prevent adjacent crops being damaged by this method of application and that, although this

cut-off line would not be a straight line, it would be not more than three to five metres from the edge of the vineyard being sprayed;

(*c*) representing that appellant would arrange everything with regard to such application; and

(*d*) failing to indicate any risk of damage to adjacent crops which could arise from application by helicopter, thereby representing that there was no such risk.

In this way appellant's representative induced in respondent the reasonable expectation that appellant was able to, and in fact would, take the necessary steps to ensure that adjacent cash crops outside the cut-off line would not be damaged if Sting were applied by helicopter.

By reason of the aforegoing, so the pleading proceeded, appellant was under a legal duty to ensure that these representations were correct and/or feasible; and respondent was induced to apply the Sting purchased by him by means of a helicopter, something he would not otherwise have done. These representations were, however, not correct and/or feasible and they were a direct and/or foreseeable cause of the damage suffered by the respondent, which damage arose because appellant, in breach of the aforesaid legal duty, unlawfully and negligently made the aforesaid representations without ensuring that they were in fact correct and/or feasible. In the premises the appellant was legally liable to compensate respondent for the loss thus suffered by him.

In its plea appellant made common cause with respondent as to the conclusion of a contract and the terms thereof, save that appellant denied and put in issue respondent's averment that it was a term of the contract that appellant would exercise supervision and control over the way in which the Sting herbicide was to be applied, either to ensure that cash crops on adjoining lands were not damaged or for any reason at all. As to the alleged representations and their consequences, appellant pleaded a total denial; and, in the alternative, that in the event of respondent proving all the facts pleaded by it in regard to this alleged cause of action, appellant would still not be liable in law to compensate respondent for its loss.

The issues raised are thus both factual and legal. I shall commence by dealing with the question of law. The decision of this Court in *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) established unequivocally that our law recognises a delictual action for damages based upon a negligent misstatement which causes purely economic loss, ie as opposed to physical injury to person or property. In delivering the judgment of the Court, Rumpff CJ made it clear that this decision did not cover the case where the negligent misstatement was made in a contractual context ('binne kontraktuele verband') and, with reference to the case of *Hamman v Moolman* 1968 (4) SA 340 (A) at 348, expressly left open the question of delictual liability in such a case (at 830C and 834F).

Hamman v Moolman (*supra*) related to a misrepresentation made by the seller of certain immovable property to the purchaser in the course of the negotiations leading up to the sale. The purchaser's claim for damages was founded, *inter alia*, upon the averment that the misrepresentation had been made negligently. In regard thereto Wessels JA, who delivered the judgment of this Court, stated (at 348D–H):

'It would seem that, in the field of contract, the making of honest but carelessly mistaken statements of fact or opinion can by no means be regarded as a modern phenomenon and peculiar to present-day circumstances. The incidence of such statements must surely have been noted and considered long before now, and the call to modify "old practice and ancient formulae" could hardly be said to arise from any recently detected urgent need "to keep pace with the requirements of changing conditions". The existing law grants what appears to be adequate protection in the field of contract to a party to whom a misrepresentation is made. Thus a contracting party may safeguard himself against loss by simply taking the elementary precaution of requiring the representor to guarantee the truth of his representations. Adequate remedies are available where misrepresentations are tainted with *dolus*, and in appropriate circumstances an aggrieved party is granted relief in the case of an innocent misrepresentation. Although pure logic and the never-ending development and expansion of legal ideas do not appear to be opposed in principle to a conclusion that in appropriate circumstances an action might be maintained to recover pecuniary loss caused by honest but carelessly made verbal (or written) misrepresentations, there is as yet in our law no authoritative determination or generally accepted definition of the principles to be applied in deciding in what circumstances such an action will lie in the field of contract.'

Wessels JA nevertheless went on to say that even if it were to be assumed in favour of the plaintiff (the purchaser) that such a claim based upon negligence were available to him, it could not succeed on the facts because, *inter alia*, the evidence did not establish negligence on the part of the seller.

This finding negativing negligence would seem to render the *dictum* in the quoted passage from the judgment *obiter*. Nevertheless, in *Latham and Another v Sher and Another* 1974 (4) SA 687 (W) at 695H–696A, Margo J considered the *dictum* to be

'. . . the clearest affirmation of judicial policy against the extension at this time of an action in delict through negligent misrepresentation inducing a contract'

and he concluded that there was no proper basis upon which that policy could be circumvented or disregarded. Consequently, though opining that there was much to be said in favour of recognising an Aquilian action for damages consequent upon a negligent misrepresentation inducing a contract, he dismissed such a claim in the case before him. This approach to the *dictum* in *Hamman's* case was followed in *Du Plessis v Semmelink* 1976 (2) SA 500 (T) at 502H–503F.

In *Kern Trust (Edms) Bpk v Hurter* 1981 (3) SA 607 (C) the actionability of a negligent misstatement inducing a contract again arose for consideration. After a full review of the authorities, South African and foreign, the Court (Friedman J, Schock J concurring) concluded (at 616F–G):

'In my view, in the light of the clear recognition by the Appellate Division in the *Administrateur, Natal* case of an action for damages for negligent misstatements outside the contractual field, there is no sound reason based either in principle or in logic, why an action for negligent misstatements inducing a contract, should not receive similar recognition. Such an action fits squarely within the confines of the *lex Aquilia* and, although the precise scope of the action will require definition, the existence of the action itself must, in principle, be acknowledged.'

I am in general agreement with this conclusion and with the reasons advanced in the judgment of Friedman J for reaching it. At the risk of some repetition of what was stated in *Kern's* case and in other judgments, I would sum up my reasons for so deciding as follows.

In terms of the case of *Administrateur, Natal* (*supra*) a delictual action for damages is available to a plaintiff who can establish (i) that the defendant, or someone for whom the defendant is vicariously liable, made a misstatement to the plaintiff; (ii) that in making this misstatement the person concerned acted *(a)* negligently and *(b)* unlawfully; (iii) that the misstatement caused the plaintiff to sustain loss; and (iv) that the damages claimed represent proper compensation for such loss. (See also *Siman and Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A) at 911B–C.) The defendant may, of course, have some special defence in law, but the abovestated formulation represents in broad outline what a plaintiff must prove in order to establish *prima facie* a cause of action on the ground of a negligent misstatement. And, as Rumpff CJ pointed out in the *Administrateur, Natal* case *supra* at 832H–833B, in order to avert the danger of limitless liability and to keep the cause of action within reasonable bounds, it is the duty of the Court *(a)* to decide whether on the particular facts of the case there rested on the defendant a legal duty not to make a misstatement to the plaintiff (or, to put it the other way, whether the making of the statement was in breach of this duty and, therefore, unlawful) and whether the defendant in the light of all the circumstances exercised reasonable care to ascertain the correctness of his statement; and *(b)* to give proper attention to the nature of the misstatement and the interpretation thereof, and to the question of causation.

In principle I can see no good reason why in the recognition of such a cause of action based upon a negligent misstatement any distinction should be drawn between a misstatement made which induces a contract and one made outside the contractual sphere. Obviously in both cases the cause of action will be subject to the limitations and strictures mentioned in the *Administrateur, Natal* case and summarised above so that the danger of limitless liability will be no more present in the one case than in the other. Indeed in many instances the contractual negotiations between the parties and the subsequent conclusion of the contract will in themselves provide the circumstantial matrix for a finding that there existed a legal duty upon the party concerned not to make a misstatement to the other. If justice requires a remedy for a negligent misstatement made by and to persons who are not in any contractual relationship, then it seems to me that justice equally requires that there be a remedy for a negligent misstatement which is made by one contracting party to the other and which induces the contract.

I turn now to examine the *dictum* in *Hamman's* case *supra*. The opening remarks to the effect that the making of 'honest but carelessly mistaken statements of fact or opinion' was by no means a modern phenomenon and peculiar to present-day circumstances and the reference to the call to modify 'old practice and ancient formulae' were made with regard to a

submission by the plaintiff's counsel who, citing the remarks of Innes CJ in *Blower v Van Noorden* 1909 TS 890 at 905, invited the Court to hold that the time has come

'where old practice and ancient formulae must be modified in order to keep touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions'.

It is no doubt true that the making of negligent misstatements in the course of contractual negotiations is not a peculiarly modern phenomenon, but at the same time I think that it must be recognised that the novelties and complexities of contemporary life have widened the potential scope for misstatement and for the damage which it may inflict. And this causes me to question, with respect, the further statement (in the *dictum*) that the existing law grants adequate protection to a contracting party to whom a misrepresentation is made. Take the present case by way of example. The purchase and sale of a chemical herbicide for application to a vineyard from a helicopter is essentially a modern type of transaction. If the law does not recognise a delictual claim for damages for negligent misrepresentation, then it would seem that in general the only relief accorded to the representee would be a contractual claim for the avoidance of the contract and restitution, including in an appropriate case an *actio quanti minoris* (see *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (A)). In the circumstances of this case a claim for restitution could have presented problems and would, in any event, have been cold comfort to the respondent.

It is also true that, as stated in the *dictum*, a contracting party can safeguard himself against loss by requiring the representor to guarantee the truth of his representation. This, with respect, seems to me to be a counsel of perfection. The realities of modern commercial life show that many laymen are not aware of such legal niceties and contract upon terms put forward by the other contracting party. In my opinion, the law should provide adequate protection for persons induced to contract by a negligent misstatement emanating from the other contracting party and not incorporated as a term of the contract; and in many instances this can only be done by granting the party concerned compensation for consequential loss suffered as a result of the misstatement.

Finally, as the *dictum* in *Hamman's* case shows, the Court was there concerned about the practical difficulties inherent in any extension of the law of negligence, as applied to conduct causing injury to persons or property, to honest but carelessly made misrepresentations causing pecuniary loss; and these concerns appear to have caused the Court to adopt a conservative approach. In my opinion, this viewpoint has been overtaken and its relevance largely ousted by the subsequent decision of this Court in the *Administrateur, Natal* case, which, as I have indicated, specifically dealt with the difficulties associated with the recognition of a delictual action for damages on account of a negligent misstatement and indicated how they could and should be overcome.

Before us appellant's counsel referred to the case of *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) in which, so it was submitted, a conservative approach to the extension of remedies under the *lex Aquilia* was stressed; and to the case of *Ericsen v Germie Motors (Edms) Bpk* 1986 (4) SA 67 (A) at 91E–G where, counsel

said, the 'apparent conflict' between the *Kern Trust* case *supra* and the *Lillicrap* case was left open. The words, 'apparent conflict', are counsel's. The Court in *Ericsen's* case merely stated that the plaintiff's advocate, in advancing a case based upon negligent misstatement inducing a contract, relied upon *Kern's* case and that defendant's advocate, in opposing it on legal grounds, cited *Lillicrap's* case; and that because the misstatement had not been shown to be negligent it was not necessary to decide this legal issue. *Lillicrap's* case itself was concerned with an entirely different issue, viz whether the breach of a contractual duty to perform professional work with due diligence is *per se* a wrongful act for the purposes of Aquilian liability, with the corollary that if the breach were negligent damages could be claimed *ex delicto*. The Court decided, mainly for reasons of policy, that it was not desirable to extend the Aquilian action to the duties subsisting between the parties to such a contract of professional service. *Kern's* case was not discussed in either the majority judgment or the minority judgment in *Lillicrap's* case and I do not consider the latter case to constitute any impediment to the recognition of a cause of action founded upon a negligent misstatement inducing a contract.

For these reasons I hold that in principle a negligent misstatement may, depending on the circumstances, give rise to a delictual claim for damages at the suit of the person to whom it was made, even though the misstatement induced such person to enter into a contract with the party who made it. The circumstances will determine the vital issues of unlawfulness and whether there is a causal connection between the making of the misstatement and the loss suffered by the plaintiff. There is no ready formula for determining unlawfulness. Each case must be decided on its own facts in the light of the principles discussed in the *Administrateur, Natal* case *supra* at 833B–834E. The principles for determining causation have been discussed by this Court in, for example, *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* (*supra*) and *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 694I–704A.

In *Kern's* case reference was made in the judgment to English and Commonwealth authority on the point. I do not propose to discuss these cases. It suffices to say that a measure of reassurance is to be gained from the fact that, prior to the introduction of the Misrepresentation Act of 1967, the English Courts had also given recognition at common law to an action for damages in tort on the ground of a negligent misrepresentation inducing the conclusion of a contract; and that this is the trend of the development of the common law in Canada, Australia and New Zealand. (See also Fleming *The Law of Torts* 7th ed at 610–11, and especially the cases cited in note 28.)

In the light of the aforegoing principles the questions which arise in this case are:

(1) whether appellant's representatives made the statements attributed to them in respondent's pleadings;
(2) whether these statements were materially false;
(3) whether there rested upon appellant's representatives a legal duty to take reasonable steps to ensure that the statements made were correct (this being pertinent to the question of unlawfulness);

(4) whether appellant's representatives failed to carry out this legal duty, ie acted negligently in the making of the statements; and
(5) if appellant's representatives did negligently fail in the carrying out of the legal duty referred to in (3) above, whether such failure caused respondent's loss.

I shall deal with each of these questions in turn, but before doing so I wish to make some general observations about the evidence led at the trial.

The respondent himself gave evidence and the following persons were called as witnesses to support his case: Frost Jnr, La Grange, Mr J L Olivier, Mr J Myburgh and Mr M W Purcell. Frost Jnr did not have anything to do with the negotiation of the contract, but he was present when the spraying operation took place on 17 August 1985. La Grange was respondent's main witness in regard to the negotiation and conclusion of the contract and the making of the alleged negligent misstatements. He also deposed to the spraying operation. Olivier was a technical adviser in the employ of the appellant in 1985 and was based in Paarl. He gave expert evidence about herbicides, including Sting, their effectiveness, methods of application and marketing. Myburgh is an agricultural meteorologist in the employ of the Department of Agriculture and Water Affairs. He gave expert evidence on air movement in general, the conditions on Jasonskloof on 17 August 1985 and the likelihood of Sting having drifted during spraying onto adjacent areas. Purcell, a chartered accountant who acted for respondent and his companies, deposed to the business arrangements in regard to the farms. His evidence is no longer of importance.

On appellant's side the only witness called was Dr J B R Findlay, a technical expert in the field of herbicides in the employ of Monsanto SA (Pty) Ltd, a subsidiary of Monsanto Incorporated of the United States of America. Monsanto manufactures Sting and distributes it through the appellant. Dr Findlay deposed to the ingredients and qualities of Sting, its uses and the methods appropriate for its application. Appellant's two representatives, Du Toit and De Wet, who played important roles in the negotiation and/or conclusion of the contract, were not called as witnesses. There is no indication that they were not available to give evidence.

I turn now to the questions posed above.

The representation (statement)

In evidence La Grange stated that he first heard about Sting early in 1985. His informant was De Wet, who visited him on the farm. De Wet told him that Sting was cheaper than Gramaxone and Reglone, which he was using at the time. On the evening of 30 June 1985 and on instructions from respondent, La Grange attended a farmers' meeting at Brandvlei Kelders at which both De Wet and Du Toit were present. Du Toit, appellant's technical adviser in the area, addressed the meeting on the merits of Sting and demonstrated its application and effectiveness by means of photographic slides. He stated that Sting could safely be sprayed from the air by means of a helicopter and that this method was much quicker than application from the ground. With reference to one of the slides Du Toit pointed to the cut-off line along the edge of the area of application and stated that 'they' (meaning appellant) had done tests to demonstrate how accurately the herbicide could be sprayed and controlled

where there were adjacent crops. La Grange, conscious of the fact that on the respondent's farms the vineyards were surrounded by cash crops, asked Du Toit after the slide presentation what the maximum distance was over which one could expect damage outside the vineyard which was being sprayed. With reference to the slide Du Toit assured him that, though the cut-off line would not be a straight line, it would not be more than three to five metres beyond the edge of the vineyard. La Grange regarded this as the most important statement made that evening. With regard to the *modus operandi* of application, Du Toit told the farmers that it would be by means of a helicopter, that appellant would make all the necessary arrangements and that all that the farmer had to do was to provide persons with flags in order to act as markers for the guidance of the helicopter pilot during the spraying operation. That evening Du Toit gave no indication of any dangers inherent in the application of Sting from a helicopter.

La Grange thereafter reported on this presentation at a weekly Wednesday meeting on the farm. Respondent's reaction was favourable, but he was somewhat concerned about the danger of damage to cash crops, particularly in a certain portion of Jasonskloof, and it was decided to ask De Wet to come to look at conditions on the farm.

Shortly thereafter, at La Grange's invitation, De Wet came to Jasonskloof. La Grange told him that 'they' were interested in spraying their vineyards from the air with Sting. Quantities and costs were discussed. De Wet was taken around the farm and shown the cash crops adjacent to the vineyards. La Grange asked his opinion as to the possibility of damage to these cash crops. De Wet assured him that there was no cause for concern and he repeated Du Toit's assertion that there would be a cut-off line three to five metres beyond the edge of the vineyard. He stated further that 'they' would be present at the spraying operation and would make all the arrangements ('alles reël'). La Grange understood this to mean that appellant's employees would be in charge of the whole operation and would exercise control over the mixing of the Sting and its application.

On the evening of Friday, 16 August 1985 De Wet telephoned La Grange and told him that he was coming to spray the following morning. At 6 am on the Saturday De Wet again telephoned to find out about the weather. On being told that it was a fine, still day, he announced that he was coming. In due course, he arrived, as also did a helicopter owned and operated by Court Helicopters (Pty) Ltd. It was decided to commence with Ratelsfontein, followed by Kykuit and ending with Jasonskloof. As far as La Grange was concerned, De Wet was in charge ('die leierfiguur') that day. He gave instructions to La Grange in regard to the transportation and placing of markers and to the helicopter pilot in regard to the spraying process. In this respect his evidence is confirmed by that of Frost Jnr who was present on Jasonskloof on the Saturday morning and testified as follows:

'Did Mr De Wet at that time give you any indication as to the supervision and/or otherwise and his presence on the farm at that time and during the spraying operation?—He said to me—well, as I understood it from him, he said, we've got nothing to worry about, that he will take care of everything.

Right?—By that I understood—well, that was to see that—mixing of the poison, checking that the pilot would fly correctly, apply it correctly and that there would be no damage.

Court: Did the discussion take place in the context of the possibility of damage?—That's correct.'

The Court *a quo* found that the representations pleaded by respondent had been established. In view of the evidence of La Grange and the absence of any evidence from Du Toit or De Wet to controvert what he said, this finding seems to me to be unassailable and I did not understand appellant's counsel to question it in his oral argument.

What appellant's counsel did question, however, was whether appellant's representatives ever undertook to provide supervision and control over the spraying operation and whether De Wet in fact did exercise such supervision and control. (As I have indicated, this was also denied on the pleadings.) In my view, insofar as it may be relevant to do so, these issues should be decided in favour of the respondent. While it is true that the evidence does not establish that the words 'supervision' or 'control' were expressly used in the contractual discussions, it was clearly implicit in what was said that appellant would supervise and control. La Grange was told that appellant would 'alles reël'; that the appellant's employees would be there on the day; and that respondent merely had to supply the markers and had nothing else to worry about. Moreover, in fact appellant's employees had, or purported to have, know-how and experience concerning the application of Sting from the air, whereas respondent and his employees had none and were not in a position to control the operation. The uncontradicted evidence of La Grange and Frost Jnr of the role assumed and played by De Wet on 17 August 1985 establishes that the latter did supervise; and this strengthens the conclusion that this was his agreed function.

Falsity of the representation (statement)

Appellant's counsel submitted that there was no, or insufficient, evidence to show that the representations made, or any of them, were false. I do not agree. What these representations, in their cumulative effect, amount to is the following: that despite the presence of cash crops (vulnerable to Sting) on adjacent lands Sting could be applied to the vineyards from the air without danger to such cash crops because, when so applied, there was a cut-off line three to five metres from the edge of the vineyard beyond which the Sting would not fall. And here I would state in parenthesis that this representation satisfied respondent because, apart from one small land where special precautions would have to be taken, there was sufficient space between the vineyards and adjacent lands to accommodate the strip alongside the vineyard up to the cut-off line. In my opinion, the falsity of this representation may be deduced from:

(1) the actual damage sustained by cash crops;
(2) the evidence that the helicopter pilot performed his duties satisfactorily;
(3) the evidence in regard to 'drift' given by Myburgh;
(4) the concessions made by Dr Findlay under cross-examination.

As to (1), La Grange gave evidence as to the damage to adjacent cash crops which became apparent some weeks after the spraying operation and which it is common cause was caused by Sting then sprayed. The wheat turned yellow in elongated flame-like patches; and the onion plants changed colour and became deformed. Reading La Grange's evidence in conjunction with the large-scale map of the farm and its lands (RSC 3), it is evident that to cause the damage which eventuated some of the Sting sprayed must have fallen up to 100 metres and more from the edge of the vineyards into the adjacent lands.

As to (2), it was suggested in argument by appellant's counsel that this damage may have been caused by pilot error. There is no evidence to support this. On the contrary, the uncontradicted evidence of La Grange was that the pilot appeared to be doing his job efficiently, that he flew about two metres above the vine trellises and that De Wet expressed complete satisfaction with the pilot's performance.

As to (3), Myburgh's evidence was to the effect that natural air turbulence and turbulence occasioned by the helicopter could cause some of the Sting herbicide released from the spray apparatus to move upwards and to remain in suspension as small droplets for some time. Factors influencing how long such droplets would so remain in suspension would include the presence of an inversion layer, the air temperature gradient, how high they were carried up into the air in the first place, natural air turbulence, the size of the droplets, and the degree of humidity (which may also affect the size of the droplets). Myburgh further explained that even on what appears to the layman to be a calm day there is a certain measure of air movement. The weather bureau regards air movement of one metre per second (3,6 km per hour) as 'calm'; but even air movement of 0,5 metres per second would mean that in the space of one minute the air would be carried a distance of 30 metres. This lateral air movement was referred to in evidence as 'drift'. Droplets of Sting held in suspension would tend to be caught up in and follow this drift. In the light of these factors Myburgh stated that he would not be able to aver that it would be safe to apply Sting to small vineyards where there were adjacent cash crops: it was almost certain that some of the Sting would fall on the cash crops.

And as to (4), Dr Findlay conceded under cross-examination that the damage to the onion land could be attributed to 'drift of some form or another'. He also stated, both in evidence-in-chief and under cross-examination, that in his view 70 per cent of the farm vineyards could be safely sprayed from the air. It would follow that in his view 30 per cent of the vineyards could not safely be sprayed. It appears, however, that this was a 'calculated guess' because he had not seen four of the vineyards.

In all the circumstances, I am satisfied that the falsity of the representation was proved.

Legal duty (unlawfulness)

In my opinion the following facts and circumstances placed upon appellant, acting through its representatives Du Toit and De Wet, a legal duty, before making the representation, to take reasonable steps to ensure that it was correct:

(*a*) the contractual relationship between the parties and the fact that the representation was material and induced the respondent to agree to purchase Sting and to contract to have it applied from the air by helicopter;

(*b*) in the circumstances under which the representation, especially that aspect of it relating to the so-called cut-off line, was initially made by Du Toit and later repeated by De Wet, it must have been obvious to appellant's representatives that respondent was placing reliance on what was told him, that the correctness of the representation was of vital importance to respondent and that if it were incorrect the execution of the contract could cause him serious damage; and

(*c*) the representation related to technical matters concerning a new product about which respondent as a lay customer would necessarily be ignorant and appellant as the distributor would, or should, be knowledgeable.

A failure on appellant's part to take reasonable steps to ensure the accuracy of its representation (ie negligence) would consequently render its conduct unlawful.

Negligence

According to La Grange, Du Toit stated at the farmers' meeting at Brandvlei Kelders that they (meaning the appellant) had done tests to establish how accurately spraying could be done from the air in the event of there being adjacent crops and that these had shown that there was a definite cut-off line. The application of the herbicide could thus be controlled. It appears from the evidence of Olivier that this was untrue. At that stage no tests had been done to determine drift action in the case of aerial application. This was not disputed by appellant.

In the circumstances the appellant's representatives had no reasonable basis for making the representation and their actions in doing so were negligent, to say the least.

Causation

This is not really in dispute. The evidence clearly establishes that but for the misrepresentation made by appellant's representatives respondent would not have gone in for the application of the Sting herbicide from the air by helicopter and consequently would not have sustained the damage caused by aerial application to his cash crops. There is thus a direct factual link between the misrepresentation and the loss suffered. By reason of the facts that respondent was technically a lessee of the farms and that the crops did not become his property until separated from the soil, there might be some debate in classifying respondent's loss: whether it be damage to property or economic loss. But this is of no consequence. In either event respondent's claim is covered by the Aquilian action.

For these reasons I am of the view that the decision of the Court *a quo* was the correct one.

The appeal is dismissed with costs, including the costs of two counsel.

Friedman JA and Preiss AJA concurred.

Kumleben JA: I share the view that the appeal ought to be dismissed, but not on the ground that there was a negligent misstatement. I do, however, agree with the conclusion that a negligent misstatement inducing a contract does give rise to a cause of action in the circumstances, and for the reasons, stated in the majority judgment. To succeed on this cause of action the respondent had to prove that the allegations relied upon were incorrect statements of existing fact or an expression of an incorrect opinion. For the purposes of this case the distinction between these two forms of misrepresentation is immaterial.

The representations relied upon were first made by Mr Du Toit to farmers, including Mr La Grange, at the meeting held at the Brandvlei Kelders and subsequently by Mr De Wet to La Grange on the farm Jasonskloof. In substance they were the same. At Brandvlei Kelders Du Toit, a technical adviser of the appellant, explained with the use of colour slides the aerial application of Sting by helicopter. In doing so, and in answer to questions, he said that it was cheaper than ground application by means of a tractor; that it was very safe; that tests had been carried out to determine the accuracy of spraying by helicopter; that 'they' (Bayers) were in a position to control and supervise its application; and that if a vineyard is thus sprayed the maximum spread of the herbicide beyond the target would be three to five metres (the 'stated limit'). This assurance was repeated by De Wet to La Grange at Jasonskloof:

'Hy het my verseker ek moenie bekommerd wees nie. Die maksimum skade sou wees drie tot maksimum vyf meter, soos mnr Du Toit ook by die vergadering gesê het. Hy het gesê ons moenie bekommerd wees nie, hulle sal alles reël, voor hy daar weg is.'

It was La Grange's understanding, on the strength of what De Wet had told him, that the appellant would supervise the spraying so that the stated limit would not be exceeded. As he put it:

'Dat hulle sal sorg dat hierdie produk op so 'n manier toegedien word op my plaas dat daar nie skade verder as vyf meter sou wees nie en dit is hoekom die vrae aan mnr Hein du Toit so gestel is en hy het geweet wat rondom daardie blokke is.'

Thus the uncontradicted evidence fully substantiated the representations pleaded

'. . . dat die beste metode vir die toediening van die produk Sting vanuit 'n helikopter sou wees;

. . . dat indien Sting aldus toegedien word daar 'n duidelike afsnylyn sou wees wat sou verhoed het dat aangrensende gewasse beskadig sou word weens hierdie metode van toediening, en dat alhoewel nie 'n reguit lyn nie, hierdie afsnylyn 'n maksimum van drie tot vyf meter vanaf die rand van 'n blok wingerd, wat aldus gespuit word, sou wees;

. . . dat verweerder alles sou reël met betrekking tot sodanige toediening'.

Against the background of this evidence it is to my mind clear that the assurance given in respect of the stated limit could not have been intended to be, or understood to be, an unqualified one, namely that, whatever the circumstances, the stated limit would not be exceeded. If any of the listeners at the Brandvlei Kelders meeting had asked Du Toit whether this assurance held good should the application take place in windy conditions, or should Sting be discharged from too great a height or with the ejecting

nozzles not properly set, the reply would surely have been: 'Obviously not. I did not trouble to say that; it is too clear.' The same answer would have been given by De Wet had La Grange put any such question to him. It is to my mind not a case of Du Toit or De Wet failing to qualify an absolute statement: the qualification is inherent. It is moreover confirmed by the stress laid on the fact that the appellant would and should supervise the operation. In the nature of things no reasonable limit could be assured in absolute terms. In the appellant's heads of argument it is submitted that 'the representation could only have been made in the context of the Sting being properly applied'. I agree. If the reasoning thus far is sound it follows that to prove the falsity of the statement it must be shown that in favourable weather conditions and with proper application and supervision the spray could not be contained within the stated limit.

The evidence makes it plain that Sting applied by helicopter could go beyond the intended target and cause damage as a result of one or more of the following extraneous factors: weather conditions; air movement primarily caused by wind; application above the prescribed height; incorrect adjustment of the spray nozzles resulting in smaller droplets than recommended; and incorrect application on the part of the pilot by failing to ensure that the spray mechanism is turned on and off at the appropriate times. Avoidance of damage due to such causes thus depends upon the knowledge and judgment of the supervisor and the skill and experience of the pilot. There was no direct evidence tendered—as one might have expected there to have been—to prove that Sting had an innate propensity to drift beyond the stated limit if applied by helicopter. This is deduced from the evidence considered in the majority judgment under four heads. I turn to them.

(1) The damage as such cannot point to any inherent unsuitability in the product rendering its application by helicopter dangerous or ill-advised. The damage could as feasibly have been caused by one or more of the extraneous causes to which I have referred.

(2) As stated in the majority judgment, no evidence was adduced indicating that lack of proficiency on the part of the pilot caused (or contributed to) the damage. La Grange said that De Wet told him that he (De Wet) was satisfied from what he had seen of the aerial spraying that the pilot was carrying out this operation satisfactorily. This answer could only have reference to what De Wet had observed up until the question was put to him and there is no evidence to indicate at what stage this answer was elicited. Moreover, it would not necessarily include confirmation that the spray nozzles were correctly set unless their setting could be determined from the ground whilst the actual spraying took place. In any event this answer can only serve as proof that there was no pilot error if De Wet's expression of opinion is to be accepted as accurate. In the circumstances, although not contradicted, I doubt that this evidence of La Grange eliminates pilot error as a cause, or as the cause, of the damage.

(3) Mr Myburgh, a climatologist in the employ of the Department of Agriculture and Water Affairs, was called as a witness by the respondent. He has both theoretical and practical knowledge of air movement but in no way professed to be an expert in the field of aerial crop-spraying. He

visited Jasonskloof and other farms where such spraying had caused damage and saw a video-tape recording of crop-spraying from a helicopter.

Various factors, he explained, influence the degree of air movement and the period during which a droplet of herbicide (or any other particle for that matter) remains in suspension. Such factors are its size (and, as other evidence indicated, its density); the height at which it is released; wind; turbulence due to the upward movement of warm air and the operation of the helicopter; and the relative humidity (the lower the degree of humidity, the greater the rate of evaporation and the rate of decrease in the size of a droplet). Myburgh also said that there is always some air movement even on what would normally be described as a calm day and that the Weather Bureau regards a day on which air movement does not exceed 1 metre per second as a 'calm day'. I mean no disrespect in commenting that there is little in his testimony which really amounts to expert evidence. His contribution, the gist of which I have summarised, is largely a matter of common knowledge and inferences which any layman would draw. The Weather Bureau's *classification* of what is to be regarded as calm weather with reference to *air* movement has in my view no bearing upon an enquiry concerned with the movement of a particular *substance* which was in suspension on a particular day.

Myburgh was also asked about the weather conditions on the morning in question, Saturday, 17 August 1985. He referred to the records kept at two weather stations more or less on opposite sides of Jasonskloof and each about 15 kilometres from the farm. They were equipped with a maximum and minimum thermometer and an instrument which records what the witness described as the 'windrun' over a 24-hour period. This device did not record the wind-speed at any particular time over such period. By use of these instruments records were kept of the maximum and minimum temperatures and the wind velocity over a 24-hour period from 8 am to 8 am. Clearly these statistics could not possibly serve to prove the weather conditions at the time of spraying on Jasonskloof. The same must be said of even more general hearsay evidence led from this witness relating to what the weather forecast was at D F Malan Airport (some 80 kilometres from Jasonskloof) for the wind and weather conditions in the Western Cape on that day.

In the course of his evidence Myburgh was asked to make some general observations on this form of aerial crop-spraying. For instance, in his evidence-in-chief there was this exchange of question and answer:

'Ek wil net vir u dit vra. Gestel mnr Myburgh in 1984 en/of vroeg in 85, is u geneem na 'n perseel toe wat gespuit word uit 'n helikopter soos wat ons dit gesien het op die Monsanto video en u is na aanleiding daarvan gevra uit 'n weerkundige oogpunt, of mens hierdie produk uit 'n helikopter op klein lande waar daar aangrensende kontantgewasse is wat beskadig mag word, kan toedien, hoe sou u na aanleiding van wat u gesien het en u kennis as weerkundige, gereageer het op daardie navraag?

. . .

U Edele, ek sal baie bang gewees [het] om so 'n bewering te maak dat hy absoluut veilig sal wees.

Hoekom?—Omdat as die stof, wanneer hy op 'n plant kom kan skade aanrig, is die—kan 'n mens amper aanneem dat daar sal van die stof op nabygeleë plante te

lande kom. Die omvang van skade sal dan net afhang van die konsentrasie, wat 'n mens nie sal kan voorspel met baie groot sekerheid nie en dan ook die kragtigheid van die stof om dood te maak.

Mnr *Nelson*: Dan weersomstandighede self?—Wel, beslis weersomstandighede ja.'

And under cross-examination:

'. . . (D)ie hele strekking van my getuienis is dat daar altyd verwag sal kan word dat daar 'n mate van "drift" sal voorkom en dat 'n mens onder geen omstandighede kan sê dat omdat op daardie oomblik die "drift" so min was dat dit nie saak gemaak het nie dit onder ander omstandighede so sal wees nie. I'm sorry?—Dit is die strekking van my betoog.

So what you are saying is because there is always the possibility of some drift, therefore you should never use a helicopter to spray the fields?—Wel, jy kan nooit enige apparaat gebruik wat nie gunstig is of wat—laat ek dit so stel, 'n helikopter sal waarskynlik—hoe hoër jy die goed vrylaat soos ek netnou gesê het, hoe groter sal die waarskynlikheid van "drift" wees maar dit het nie gegaan daaroor nie. Dit gaan as jy die—uit 'n helikopter waar jy dit hoog vrylaat teenoor waar met 'n trekker waar jy dit laag vrylaat sal jou kans op "drift" minder wees—anderste om ek bedoel.'

Apart from the fact that, as I have said, he has no expert knowledge of crop-spraying, this sort of evidence in my opinion cannot carry weight.

In the result I do not consider that reliance ought to be placed on the evidence of this witness to prove that the statement was false.

(4) It remains to examine the evidence of Dr Findlay. He was the only witness called on behalf of the appellant. After graduating he was employed as an entomologist by a State department involved with the registration of insecticides and the instructions and other details to be stated on the labels of such products. At a later date he was employed by an American company called Monsanto. It manufactured Sting, which was then supplied to the appellant, amongst other distributors. Sting was registered in March 1985 after certain tests on the effectiveness and safety of the product had been carried out for about two and a half years.

Towards the conclusion of his evidence-in-chief Findlay was asked about the suitability of applying Sting to vines on Jasonskloof from a helicopter. It soon emerged that he had not carried out the necessary investigation to be able to deal authoritatively with this aspect of the case. His evidence is as follows:

'Mr *Bowman*: Right. Now if I were to ask you whether that farm that we went to see, Jasonskloof, whether the recommendation could suitably be made that its vineyards be sprayed by means of a helicopter, what would you say?—Certainly I think the majority of it can. There're one or two areas that I think you would need to think very closely about. I wouldn't take the decision to. . . .

Well let's deal with it directly.

Court: You're just talking about vineyards now, right? The too much spray in the vineyards?—Well the areas that we saw that are marked yellow on the map of the farm.

Yes, those are vineyards, yes.

Mr *Bowman*: Can we deal with those areas with which you would have some difficulty. You have a reference to the map which is behind you or as page 1 of the bundle—Right. I have a little one here, I assume it's the . . .

Which areas would you have some difficulty with making the recommendation for?—I think as previously was mentioned I think where there're power lines and telephone lines, you know, that's always a problem in any aerial application see.

Court: Well nobody has really yet mentioned it being a problem. So you say there's a problem?—Well its not insurmountable. And certainly I think that field No 2, that little one where there were—next to the river.
Mr *Bowman*: Next to the river?—River, where there were the big wattle trees and there were two power lines crossing. I wouldn't recommend that for spraying. . . .'

This evidence is to be read in conjunction with the map (RSC 3) on which eight vineyards and six lands adjoining or close to them are depicted. Vineyard No 2 has five segments as shown on this map. This vineyard taken as a whole cannot be described as 'that little one': at least three others are smaller and three larger. His evidence suggests that he was referring to a segment, No 26 (0,3 hectares in extent), of this vineyard No 2. On further questioning by the Court he said:

'So which was the other vineyard you were unhappy with? Because of power lines?—There's some corners where, you know, there's telephone wires and power lines crossing, which I think you can't expect a helicopter to get in there.
Mr *Bowman*: Get into the corners or get into the vineyard as a whole?—I didn't see all the vineyards, the ones at the top, the six, seven and eight, but *I would guess that a helicopter could probably treat, I don't know*, 70, 75 per cent of the areas we saw excluding number two.
Court: So if you had your way you—forget anybody else now—you would say to them, we can do 70, 80 per cent aerially? 70 . . .?—Ja, right. . . .
All right, roughly 70.—*I hazard a guess on that.*
Yes okay. Well nobody's holding you to any exactitude. Roughly 70 per cent, and the rest you must go and do by conventional methods. Is that what you would do?—You see *that would be* again *determined by the pilot* because he's going, as he's flying then he's going to say, well look, he can't get as close to that power line as he thought he could.'

And under cross-examination:

'Mr *Nelson*: Would you just turn to document No 1?—That's a map?
Yes. You indicated in your evidence that you would recommend that approximately 70 per cent of this farm be sprayed from the air if you were making a recommendation. Is that correct?—By *let's say a sort of calculated guess*. I haven't seen all the lands.'

(I emphasise.) The further questioning under cross-examination fails to elucidate his evidence but certainly confirms that it was vague and speculative. The only reliable inference to be drawn is that Findlay had not really applied his mind to what vineyards or portions of a vineyard, if any, ought not to have been sprayed by helicopter due to the presence of obstructions such as trees and power lines. His evidence, as he more than once said or implied, was largely guesswork. When asked whether the damage could have been caused by spillage rather than drift he said that he would have expected the latter to have been the cause, but added:

'You know, I am not all that familiar with the pattern of the damage and all that, so I don't know that I am—whatever I say there is, I think, a bit speculative.'

But even on an interpretation of his evidence most favourable to the respondent it does not prove the falsity of the representation. It establishes at best that certain vineyards, or sections thereof, ought not to have been subjected to aerial spraying and that proper supervision on the part of the appellant, or the exercise of sound judgment on the part of the pilot,

would have insured that this risk was not taken. The stated limit, as I have said, could never have been intended to apply if such obstructions obliged the pilot to discharge the Sting from an excessive height.

Finally, it ought to be mentioned that, perhaps because the amount of damages was not in dispute, exact details of the extent and locality of the cash crops affected were not furnished. These facts cannot be determined from the record with any degree of accuracy. The damage would appear to have been erratic rather than a general or reasonably consistent drift of the herbicide beyond each vineyard and the stated limit on its perimeter. This, it would seem, lends some support—I put it no higher—to the view that what I have referred to as extraneous factors, or one such factor, probably caused the damage.

The question of the falsity of the representation is dealt with in the following two paragraphs of the judgment of the Court *a quo*:

'It appeared from the evidence of Olivier, a former employee of defendant, and of Findlay, an expert in the employ of Monsanto, the manufacturer of "Sting", who testified on behalf of defendant, that at no stage had defendant carried out tests with a view to determining whether or not "Sting" could be applied accurately. The one and only test application of this herbicide was done in 1984 on the farm of a Mr Wium, but this was not performed with a view to ascertaining the accuracy whereunder or the circumstances in which it would be safe to apply the product aerially.

Drift damage is not uncommon and can occur even in calm conditions. This was borne out by the testimony of Findlay and Myburgh, an agricultural meteorologist employed by the Department of Agriculture and Water Affairs. Findlay, who clearly has a great deal of expertise in this field, indicated that he would not have recommended aerial application on 30% of the lands inspected by the Court during the inspection *in loco*. Furthermore, as appeared from the evidence of both Findlay and Myburgh, it is wholly inappropriate, and possibly even irresponsible, to predict the extent of drift which will occur in a given instance with reference to the absence of drift in another area at another moment in time.'

As to the first paragraph, the fact that no tests were carried out takes the matter no further. A statement that tests were conducted is not one of the representations pleaded. Apart from that, the failure to carry out tests beforehand cannot contribute to the conclusion that the stated limit assurance was false. As to the second paragraph, I have given my reasons for concluding that the falsity of the statement cannot be founded on the evidence of Findlay or Myburgh.

In the result I am unable to conclude that the factual basis has been laid for a cause of action founded on negligent misstatement.

One of the alternative causes of action relied upon by the respondent was breach of contract. The relevant pleadings in this regard are contained in two separate paragraphs of the particulars of claim.

In para 3 the respondent alleges that in August 1985 he, represented by La Grange, entered into an (express) oral agreement with De Wet, acting for the appellant, in terms of which the respondent undertook to buy Sting from the appellant for its application by helicopter to the vineyards on, *inter alia*, Jasonskloof; the appellant was to make all the necessary arrangements in this regard; and it undertook to exercise the necessary supervision and control, through its servants, over the mixing and application of the herbicide to ensure that cash crops on the adjoining

lands would not be damaged. In return the respondent was to pay for the Sting used and the reasonable costs of applying it. Such payment would be made by debiting these costs to the respondent's account with his agricultural co-operative society, which would in turn make the necessary payments on his behalf. In the plea the sale, supply and method of payment of the Sting are admitted. However, it is alleged that the appellant undertook, on behalf of the respondent and as his agent, to arrange for its application by helicopter. The other averments in this paragraph are denied.

In para 8.1. of the particulars of claim the respondent alleges, in amplification of the agreement pleaded, that the appellant expressly, or alternatively tacitly, warranted that Sting could be applied by helicopter to the various vineyards on Jasonskloof without this method of spraying causing damage to the existing cash crops on adjoining lands; and that the appellant's staff had the necessary skill and experience to ensure such safe application.

Thus, with some duplication, the term and warranty relied upon were (i) that the appellant undertook to supervise and control the proposed form of application in such a way as would ensure that the adjoining cash crops were not damaged—at least not beyond the stated limit; and (ii) that the appellant warranted that Sting was a herbicide suited for aerial application by helicopter and in particular that this method could be successfully used to spray the vineyards on Jasonskloof.

As to (i) above there can, in my view, be no doubt that the duty to supervise was a tacit, if not an express, term of their agreement; and that to supervise obviously means to do so properly and effectively. Though the respondent was not a direct party to the agreement, his understanding was that the appellant would control the way in which the herbicide was to be applied: 'would do everything', as the respondent put it. According to La Grange at the meeting of the farmers and later on Jasonskloof, De Wet gave the assurance that the appellant would make all the arrangements and supervise the operation, implicitly in a proficient manner. When this question was canvassed in cross-examination the evidence of La Grange was to this effect:

'Bayer, dit wil sê mnr De Wet al weer, het dus nooit vir u gesê in terme, hy het nie die woorde gebruik, dat hulle enige beheer of kontrole sal uitoefen oor die toediening van die Sting nie?—Hy het vir my gesê hulle sal teenwoordig wees, ek moet nie bekommerd wees nie en weer genoem hulle reël alles.

Maar wat u verstaan het met wat hy gesê het, is dat hulle daardie kontrole of beheer sal uitoefen?—Hulle sou na alles kyk.

Dit is wat u ook op bl 301 van die oorkonde gesê het, Bayer het vir my laat verstaan hulle reël alles. Wat ek verstaan as iemand vir my sê hy sal alles reël, as mnr Frost vir my sê, spuit Sting op Jasonskloof en ek sê vir hom ek sal alles reël, dan word daar van my verwag dat ek honderd persent kontrole uitoefen oor hoe daardie gif gemeng en toegedien word in die wingerd en as daar enige fout is, dan sal ek die verantwoordelike wees wat dit gereël het. Dit was u verstand van die posisie, dit is nie wat mnr De Wet vir u gesê het nie?—Ek het aangeneem omdat ek hom die blok gaan wys het waar die gevaarstrook was, het hy my laat verstaan dat hulle deskundiges is in die gebied waar daardie produk neergesit word. . . .

Maar hy het nooit vir u gesê dat hulle, Bayer, die toesig en beheer oor die metode van die bespuiting sal uitoefen nie?

Hof: Hy het dit in soveel woorde gesê, dit is eintlik die vraag?—Hy het dit kort maar kragtig gesê.'

That an undertaking to supervise was a term of their agreement is of course borne out by what actually took place. De Wet supervised the operation throughout and La Grange, even had he been asked to do so, lacked the necessary knowledge. All that La Grange was required to do was to provide labourers as markers.

In my view the warranty ((ii) above) was likewise proved. La Grange explained that the most important question asked at the farmers' meeting was whether there would be peripheral damage since all the farmers present had vines interspersed with other crops. The assurance of the stated limit was thus of vital concern to them. Later on the farm De Wet and La Grange inspected the areas which were to be sprayed and De Wet was especially shown those lands where there was no road separating a vineyard from an adjacent land with cash crops on it. The assurance of the stated limit was again given. In *Naude v Harrison* 1925 CPD 84 at 90 it is stated that:

'We have to ascertain whether both parties intended to contract that the thing sold should be as represented, whether the seller intended to bind himself in law that the thing would comply with what he had stated, or at any rate so acted as to estop himself from denying such intention. It is not sufficient that the purchaser relied on the statement—that may be enough for a *dictum*, but not for a *promissum*—it must also be shown that the seller contracted that the statement would be made good.'

The warranty was not expressly given in that at no stage did De Wet in so many words say that the appellant 'warranted' or 'guaranteed' that the stated limit would not be exceeded. What the respondent relied upon was a tacit term to that effect. The degree of proof required to prove a tacit agreement, and *a fortiori* a tacit term or warranty forming part of an agreement, is discussed in *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd* 1984 (3) SA 155 (A) at 164G–165F:

'As to tacit contracts in general, in *Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc and Others* 1983 (1) SA 276 (A) it was stated (at 292B–C):

"In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact *consensus ad idem*. (See generally *Festus v Worcester Municipality* 1945 CPD 186 at 192–3; *City of Cape Town v Abelsohn's Estate* 1947 (3) SA 315 (C) at 327–8; *Parsons v Langemann and Others* 1948 (4) SA 258 (C) at 263; *Bremer Meulens (Edms) Bpk v Floros & Another*, a decision of this Court reported only in Prentice Hall, 1966 (1) PH A36; *Blaikie-Johnstone v Holliman* 1971 (4) SA 108 (D) at 119B–E; *Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd* 1979 (3) SA 267 (W) at 281E–F; *Muhlmann v Muhlmann* 1981 (4) SA 632 (W) at 635B–D.)"

This is the traditional statement of the principle, as is borne out by the cases cited; and it was accepted as being correct by appellant's counsel. The correctness of this general formulation has nevertheless been questioned on the ground that it would appear to indicate a higher standard of proof than that of preponderance of probability as regards the drawing of inferences from proven facts (see Christie *The Law of Contract in South Africa* at 58–61; cf also *Fiat SA v Kolbe Motors* 1975 (2)

SA 129 (O) at 140; *Plum v Mazista Ltd* 1981 (3) SA 152 (A) at 163–4; *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* 1983 (1) SA 978 (A) at 981A–D). In this connection it is stated that a Court may hold that a tacit contract has been established where, by a process of inference, it concludes that the most plausible probable conclusion from all the relevant proved facts and circumstances is that a contract came into existence (see *Plum's* case *supra* at 163–4). It may be that in the light of this the principle as quoted above from *Standard Bank of SA Ltd v Ocean Commodities Inc (supra)* requires reformulation. In this regard, however, there is this point to be borne in mind. While it is perfectly true that in finding facts or making inferences of fact in a civil case the Court may, by balancing probabilities, select a conclusion which seems to be the more natural or plausible one from several conceivable ones, even though that conclusion is not the only reasonable one, nevertheless it may be argued that the inference as to the conclusion of a tacit contract is partly, at any rate, a matter of law, involving questions of legal policy. It appears to be generally accepted that a term may not be tacitly imported into a contract unless the implication is a necessary one in the business sense to give efficacy to the contract (see *Van den Berg v Tenner* 1975 (2) SA 268 (A) at 276H–277B and the cases there cited). By analogy it could be said that a tacit contract should not be inferred unless there was proved unequivocal conduct capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. Be that as it may, this is not the occasion to resolve these problems. The point was not argued and, on the view I take of the facts, it is not necessary to decide what real difference, if any, there is between the viewpoints outlined above or to express a preference for one or the other.'

The approach in *Plum v Mazista Ltd* has been endorsed by this Court in *Mühlmann v Mühlmann* 1984 (3) SA 102 (A), a judgment delivered on 30 September 1983 but only reported in the law reports just short of a year later. On either approach I consider that the tacit warranty was proved. The test is an objective one. Spraying by tractor was the conventional and safe method hitherto used by farmers in that area on their vineyards. The saving in time and money gained by converting to aerial spraying would never have been contemplated in the absence of a guarantee that, beyond that stated limit, any damage to other crops could and would be averted. In the absence of any such warranty the danger of consequential loss, even as a remote risk, far outweighs the advantages of this proposed form of application. There can be little doubt that this was fully realised by both parties when the assurance of the stated limit was repeatedly sought and given and when the agreement was concluded and carried out.

In considering the remaining question, whether there was a breach of the agreement pleaded, one must in the first place examine the position of the pilot. It was submitted on behalf of the appellant that he was the agent of the respondent or at least not the servant or employee of the appellant for the purpose of the spraying operation. The evidence shows that he was *ad hoc* its servant. In *Ongevallekommissaris v Onderlinge Versekerings-Genootskap AVBOB* 1976 (4) SA 446 (A) at 456G–H it was stressed that

'. . . die kwessie van beheer gewoonlik die sterkste oorweging is by die beslissing van die vraag of 'n besondere verhouding dié van heer en dienaar is of nie, maar dat daar ook ander geldige oorwegings kan wees en dat elke besondere geval in die lig van sy eie omstandighede beslis moet word'.

Everything points to the fact that the pilot was exclusively under the control of De Wet during the entire operation. He was under De Wet's

orders and exercised no independent judgment at any stage, though obviously in the carrying out of instructions his experience and skill as a pilot was involved. Neither the respondent nor La Grange had any part in the selection of the pilot. They did not know his identity, or even the name of the crop-spraying firm the appellant had engaged, until the helicopter arrived on the scene. Had the pilot been in any way their responsibility this would not have been the case. The fact that the respondent was to pay for the costs of the spraying direct to the aircraft firm and that such fee was not part of a composite charge made by the appellant is not in the circumstances of any importance. In carrying out this operation the pilot was clearly on the same footing as any person in the permanent employ of the appellant.

It remains to consider whether there was a breach of the term and warranty pleaded. In discussing the evidence in relation to the other cause of action (negligent misstatement) the possible reasons for the damage to adjoining lands were listed. In sum, it could only have been caused by Sting being inherently unsuitable for aerial spraying; pilot error, which would include the incorrect setting of the nozzles; the unsuitability of the farm or portions of it to be sprayed in that manner as a result of the layout of the lands and vineyards or the presence of obstructions; or lack of supervision on the part of De Wet, for instance, in allowing the spraying to take place, or to continue, in unfavourable weather conditions. *Prima facie*, in fact as a probability, one of these causes, or more than one, operating jointly or intermittently, must have been responsible for the damage. It was not for the respondent to attempt to identify the cause or causes in respect of the damage to each adjoining land. This was, or ought to have been, within the peculiar knowledge of De Wet or the pilot. Neither was called as a witness to explain the precise cause or to suggest any other which would exonerate the appellant for what must otherwise be taken to have been a breach of the agreement between the parties.

For this reason I agree that the appeal should be disallowed and with the order proposed in the majority judgment.

Hefer JA: Although I agree that a negligent misstatement in a contractual context is actionable as set out in the majority judgment, I concur in the judgment prepared by my Brother Kumleben. For the reasons stated therein, and for the additional ones that follow, I agree that the appeal ought to be dismissed with costs, including the costs of two counsel. My remarks will be limited to the falsity of the representations relied upon in the claim based on negligent misstatement.

As stated in the majority judgment the cumulative effect of the representations was that Sting could be applied to a vineyard by means of a helicopter without endangering crops on adjacent lands because, when so applied, it would not fall beyond a line (the 'cut-off line') three to five metres beyond the edge of the vineyard. What, in practical terms, the respondent had to prove was that it was physically impossible to contain the Sting released from the aircraft in the form of a fine spray within the area comprising the vineyard and the adjoining strip of land along its edges up to the cut-off line.

There are two ways in which this could be proved. The first would entail expert evidence to the effect that there is no way of controlling the lateral movement of the spray and thus to contain it within the desired bounds. Another method would be to lay a sufficiently strong factual foundation for an inference as a matter of probability that the representations were false. This could be done, for example, by proving that Sting actually applied from a helicopter in perfect weather conditions by a competent pilot who performed the task skilfully and properly with suitable equipment fell beyond the cut-off line despite all precautionary methods having been taken.

Respondent seems to have selected the first method. Instead of proving that the weather conditions were favourable he sought to establish through Myburgh that they were not; and instead of proving that precautionary measures were taken, he sought to establish that the direction or strength of the wind was not even tested. He did so presumably because he had an alternative claim based on the negligence of appellant's employees in supervising the operation in which it was alleged, *inter alia*, that it was carried out in unfavourable conditions. Be that as it may, it is clear that the meagre information about the way in which the operation was conducted does not justify an inference that the representations were false. The importance of the correct setting of the nozzles on the helicopter boom through which the Sting was released is manifest; yet there is no evidence that they were properly set. And there is evidence that the risk of drift could have been reduced by using an additive; yet we do not know whether such an additive was used or not. In the absence of evidence on matters like these it cannot be said that there is a sufficiently strong preponderance of probability that the Sting fell beyond the cut-off line because it could not be contained in the target area.

This conclusion is not affected by the evidence about the way in which the pilot performed his duties. Even if it were to be accepted that he did so satisfactorily there are still the shortcomings in respondent's case that I mentioned. But I share my Brother Kumleben's misgivings about the cogency of the evidence in this regard. He refers in his judgment to what appears to be the erratic pattern of the damage caused by the Sting to respondent's onions and wheat. Bearing this in mind and that some of the Sting fell about 100 metres from the edge of the nearest vineyard and even beyond some fairly high trees on a day on which there was no noticeable wind, there is a serious question about the way in which the pilot performed his duties.

I turn to the evidence of Mr Myburgh. His assertion that ''n mens amper kan aanneem dat daar sal van die stof op nabygeleë plante te lande kom' when Sting is sprayed from a helicopter in the vicinity of sensitive plants is based entirely on his knowledge that there is always some movement of air in the atmosphere although it may not be noticeable. The following passage contains a neat summary of his evidence:

'. . . (D)ie hele strekking van my getuienis is dat daar altyd verwag sal kan word dat daar 'n mate van "drift" sal voorkom en dat 'n mens onder geen omstandighede kan sê dat omdat op daardie oomblik die "drift" so min was dat dit nie saak gemaak het nie, dit onder ander omstandighede so sal wees nie.'

This may be so, but his experience of actual spraying from the air is limited to one occasion when he attended a demonstration of water being sprayed from a helicopter and another one when he witnessed from a distance a wheat field being sprayed from a fixed-wing aircraft. He is not aware that, as Dr Findlay testified, skilled pilots know how to handle drift; they know that they must allow for it and how to do so; at times they even 'drift' the substance being sprayed into inaccessible places. At best for the respondent Myburgh's evidence suggests that some margin should always be left for error. He was not asked to express an opinion on the extent of such a margin nor on the sufficiency of the three to five metre margin of error for which the representations allowed. His evidence does not justify a finding that the representations were false.

Appellant's Attorneys: *C K Friedlander, Kleinman & Shandling*, Cape Town; *John & Kernick*, Johannesburg; *Webbers*, Bloemfontein. Respondent's Attorneys: *Balsillie, Watermeyer & Cawood*, Cape Town; *McIntyre & Van der Post*, Bloemfontein.

M NO v M

DURBAN AND COAST LOCAL DIVISION

PAGE J

1990 November 12–14; 22

*Minor—Marriage—Hindu marriage entered into between plaintiff's minor daughter and defendant, a major—Agreement between plaintiff, acting on behalf of minor, and defendant and his father, that marriage would subsequently be registered according to laws of South Africa—Following Hindu marriage, minor, a virgin, allowing defendant to have sexual intercourse with her in anticipation of civil marriage—Defendant subsequently repudiating obligation to register marriage—Plaintiff claiming damages for seduction and breach of promise to marry—Fact that defendant's father and plaintiff negotiated terms of marriage in accordance with Hindu custom not having result that no privity of contract existing between minor and defendant—Marriage Act 25 of 1961 not prohibiting contracting of valid espousal through agency of another—Defendant bound to undertaking to register marriage and failing to honour such obligation without lawful excuse—Such constituting breach of promise of marriage—*Quantum *of damages —Court finding that damages for seduction and breach of promise*