

**National Stevedores (Pty) Ltd v mv “Afris Pioneer” & another  
[2006] JOL 16640 (N)**

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Case No.: AR289/02  
Judgment Date(s): 09/05/2003  
Hearing Date(s): 25/04/2003  
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Country: South Africa  
Jurisdiction: High Court  
Division: Natal  
Judge: Levinsohn J  
Bench: Levinsohn, Hurt, Patel JJ  
Parties: National Stevedores (Pty) Ltd (A); mv “Afris Pioneer” (1R), Afris Lines (Mauritius) Ltd (2R)  
Appearance: Adv GD Harpur SC, Deneys Reitz (A); Adv SR Mullins SC, Shepstone & Wylie (R)  
Categories: Appeal – Action – Civil – Substantive – Private  
Function: Confirms Legal Principle

**Key Words**

Contract – Oral agreement – Actionable non-disclosure – Duty to disclose – Negligence – Not established – Appeal dismissed with costs

**Mini Summary**

An accident occurred whilst one of the plaintiff’s servants was operating a derrick belonging to the first respondent. Believing that its servant caused damage to the derrick, the plaintiff agreed to have the derrick repaired and to pay the costs of the repair. Unbeknown to the plaintiff, a derrick on a sister ship also belonging to the defendant had failed some two months before as a result of an alleged defect in one of its components. According to the plaintiff the defendant’s representatives, who had knowledge of this component defect, suppressed this information. The plaintiff claimed for the cost of repair on the grounds of an actionable non-disclosure. The court *a quo* absolved the defendant from the instance. On appeal the main question was whether the plaintiff could resile from an oral agreement to repair the derrick on the grounds of the non-disclosure.

**Held**, on the facts, that the knowledge that the defendant had acquired about the derrick with a defective component on a sister ship could not be used to establish an inherent defect in the derrick in question. However, if this finding were wrong, the question arose as to whether the defendant’s representative had had a duty to disclose this information, and had been negligent in not doing so. In the circumstances that prevailed no duty had arisen, and if it had, the defendant’s representative had not been negligent. The court *a quo* had correctly absolved the defendant from the instance.

**LEVINSOHN J:** For ease of reference and for convenience I shall refer to the parties to this appeal by their respective designations in the court *a quo*.

The plaintiff instituted an action against the first and second defendants claiming payment of an amount of R291 504,84. During the course of the proceedings the second defendant fell out of the picture and I shall refer to the first defendant hereafter as “the defendant”. In its particulars of claim the plaintiff averred that it had entered into an agreement with the defendant in terms of which the plaintiff would pay for the repair of the defendant’s 60t SWL Jumbo Stulken Derrick. This derrick had been damaged on 30 March 1996 while being operated by a servant of the plaintiff. It was common cause that on the day that the derrick was damaged all interested parties met on board the defendant with a view to determining how the derrick in question was to be repaired and more importantly who was to pay for the repairs. The plaintiff avers that it undertook to pay for these repairs on the footing that it believed that it was possibly the operator’s negligence that caused the damage to the derrick. It is further common cause that the plaintiff instructed IMAC to effect the repairs. It also hired a crane from Portnet to complete the loading of cargo into the particular hold of the defendant vessel. The plaintiff’s fundamental assertion in the case is that it agreed to pay for the repairs and the hire of the crane because it was persuaded by the first defendant’s representatives that its servant had negligently caused the damage to the derrick. However, unbeknown to it prior to the accident in question one of the derricks on the defendant’s sister ship had also failed during operation as a result of an alleged defect in a component. According to the plaintiff the defendant’s representatives who had the knowledge of the previous incident suppressed this fact from the plaintiff. If the plaintiff had been aware of same it would not have agreed to pay for the repairs. In these circumstances the plaintiff seeks to cancel the agreement it concluded and to recover the amounts it expended. The causes of action pleaded are in the main based on actionable non-disclosure inducing a contract, alternatively the *condictio indebiti*. The defendant joined issue and disputed that the plaintiff was entitled to repayment. It averred in the alternative that if the court were to find that it is in fact obliged to do so, the plaintiff is indebted to it in an amount equivalent to the costs of repairs which indebtedness arises from the plaintiff’s delictual liability to the defendant arising from the negligence of the plaintiff’s servant. Set-off would therefore operate to expunge the defendant’s liability to repay the amount aforesaid.

The learned Judge in the court *a quo* absolved the defendant from the instance. He held that the plaintiff had not proved the agreement pleaded in the particulars of claim and even if it had proved an agreement the cause of action based on non-disclosure foundered. In addition the learned Judge held that as far as the cause of the damage was concerned the probabilities were evenly balanced and in effect the defendant had not proved the defence based on set-off. The alternative cause of action based on the *condictio indebiti* did not feature in the court *a quo* nor was it an issue before us on appeal.

Counsel for the plaintiff attacks the findings of the court *a quo*. He argues in the first instance that the learned Judge was wrong in concluding that the agreement as pleaded had not been proved. In order to properly deal with counsel’s argument it is necessary at this juncture to focus more closely on the pleadings.

The plaintiff alleged that on the date in question the parties had concluded an oral, alternatively a tacit, agreement. The material terms of this agreement are set out in paragraph 6 of the particulars of claim as follows:

“That the plaintiff would:

- (a) pay for the repair to the first defendant’s 60t SWL Jumbo Stulken Derrick (‘the derrick’), which had been damaged on 30 March 1996 at a time when the first defendant was under a time charter to the second defendant and incidental and resultant Portnet expenses;

- (b) make such payment to and on behalf of:
  - (i) the first and second defendants jointly and severally;
  - (ii) *alternatively* the first defendant;
  - (iii) *alternatively* the second defendant;

(Hereinafter the defendants or defendant so referred to are referred to as ‘the responsible defendant;’).

The defendant in paragraph 3 of its plea admitted that the parties had concluded an oral agreement. The terms of this oral agreement are substantially as set out by the plaintiff save that the defendant alleges a further term, namely that the plaintiff acknowledged that the damage sustained to the derrick had been sustained in consequence of the negligent operation thereof by an employee of the defendant.

The plaintiff’s principal witness on this issue was Jonathan Graham Thurlow, the financial director of the plaintiff. He went to the vessel on that particular Saturday morning. A meeting was held by all the interested parties on the vessel. Thurlow said that the inference was that the plaintiff was responsible for the damage to the crane. He took the decision that the plaintiff would bear the costs of repairs even though no-one had proved categorically that the plaintiff was responsible. He also bore in mind that the Afris line (the erstwhile second defendant) was a fairly large client of the plaintiff. According to Thurlow it was the plaintiff’s policy to “work with clients where there is a possibility that we may have caused damage”.

Counsel for the defendant submits that the probabilities point only in one direction and that is that the plaintiff agreed on that day to pay the repair costs. It did so unequivocally and without any reservation of rights. On a reading of Thurlow’s evidence and that of all parties who attended this meeting one gains the clear impression that they would have walked out knowing that there was consensus among all that the plaintiff would pay. The fact that the mechanism for the implementation of the agreement would necessarily involve contracting with IMAC is neither here nor there. The plaintiff’s representative communicated to the defendant what was to occur and the defendant either expressly or tacitly accepted which, in my view, leads to the inescapable and most probable inference that an agreement was indeed concluded. Whether this agreement was in the nature of a compromise or not seems to me to be irrelevant. However, it must be said a compromise is always preceded by a dispute between the parties and an agreement to settle such dispute precludes any party thereto from suing on the original cause of action or, if an action has already been instituted, continuing with that action. In the instant case the probabilities are overwhelming that at the stage of the meeting the plaintiff had not placed in dispute its liability to repair the crane.

On the basis that the plaintiff proved the agreement I turn now to consider whether it can resile from the agreement on the grounds alleged. As indicated plaintiff relies on a material non-disclosure. This is pleaded in the following terms:

8. “At all material times prior to and at the time of the conclusion of the agreement the responsible defendant knew or ought to have known:
  - a) that one or more other vessels of the same class had experienced similar damage to their derricks and that a probable cause was the inherent defects in those derricks;
  - b) *alternatively* to paragraph 8(a) hereof, that the sole cause of the damage to the derrick was its inherent defects and not any actions by or on behalf of the plaintiff.
9. At all times prior to and at the time of the conclusion of the agreement the responsible defendant failed to disclose the facts set out in paragraph 8(a), *alternatively* 8(b) above to the plaintiff.
10. The responsible defendant thereby, as a result of its omission, made a representation (‘the representation’) to the contrary to the plaintiff.

11. The representation was intended to, and did, induce the plaintiff to conclude the agreement.
12. The representation was made by the responsible defendant:
  - a) knowing of its falsity;
  - b) *alternatively* negligently, in breach of a duty of care owed to the plaintiff;
  - c) alternatively, innocently.
13. After having incurred obligations to make payment in terms of the agreement the plaintiff discovered the falsity of the representation.”

At the outset it is necessary to determine whether the plaintiff has proved on a preponderance of probability the allegations made in paragraph 8(a), alternatively 8(b), *supra*. Counsel for the plaintiff concedes that subparagraph (b) has not been proved. Attention is therefore focused only on subparagraph (a). It is here alleged that what was known to the defendant’s representatives was that other vessels had experienced similar damage to their derricks. Counsel for the plaintiff informed us that he had moved an amendment to introduce the words “or related” after “similar”. It appears that no order was made on his application for amendment but I am prepared to assume that the case can be decided on the basis that those words were introduced in the pleadings. The second leg is that probable cause of this similar or related damage was the inherent defects in those derricks. I stress the twofold nature of the allegation:

“You knew that one or more vessels of the same class had experienced similar or related damage to their derricks and you knew as well that the cause of this was inherent defects in these derricks.”

During January 1996 the heel-pin of the derrick on board the vessel (“the Pongola”), a sister vessel of the defendant but operated by a different shipping line, cracked during operation and caused heavy damage to that vessel’s structure and one of the hatches. One Thiessen in Hamburg sent a telex to the master of the defendant vessel in the following terms:

“To master afris pioneer  
from reedderruss hamburg  
good day captain riesenbeck  
have just been informed by unicorn that on a sister vessel to afris pioneer the heel pin of the heavy lift derrick cracked during operation (glatter Bruch des Lümmelbolzens) causing heavy damages to vessels structure and hatch no. 2.  
Pls check carefully and advise.  
Regards Thiessen.”

In response to this telex the master of the defendant sent the following telex:

“To Ernst russ hamburg  
fm afris pioneer  
attn.: capt. Thiessen  
re: heavy lift derrick  
during a routine check, about 2 months ago, the c/o observed that the heel-pin of the ‘jumbo’ has moved out about 10–15 mm. When checking, found the threads of the safety-screws in a very bad condition. We jacked up the end of the derrick a bit and pulled the bolt back by means of screws and applying new safety-screws.  
so far no problems.  
brdgs/ri.”

Several important observations result from this exchange of telexes. Firstly, that the master of the defendant was made aware of the fact that the heel-pin on one of the derricks of another ship had broken. Secondly, the circumstances under which it broke were not disclosed and

one would be entitled to speculate that either the damage had been caused by operator negligence, alternatively a failure to maintain the derrick, and further alternatively some inherent defect in the design of the derrick. Thirdly, the intention was to alert the master of the defendant to a possible problem; and fourthly, it appears that the master had only about two months previously conducted an inspection of the heel-pin and, as indicated in the telex quoted, certain remedial work was done.

Indeed before the matter came to trial the defendant admitted that it was made aware on 29 January 1996 that the heel-pin of the heavy lift derrick on a sister vessel had cracked during operation causing damage to the vessel's structure in the range of hatch 2.

I am of the opinion that the knowledge acquired by the defendant as a result of the exchange of these telexes cannot, by any stretch of the imagination, establish the similar damage and probable cause of this damage being inherent defects in those derricks, as is alleged in the particulars of claim. I thus find myself unable to agree with counsel for the plaintiff's submission to the contrary.

However, in case I am wrong on this I proceed to consider whether the defendant ought to have disclosed to the plaintiff the mere knowledge of the facts acquired *ex facie* the telexes. I make an assumption on this part of the case that the issues on the pleadings had been widened to encompass this enquiry.

The learned Judge in the court *a quo* gave an in-depth and comprehensive review of the legal principles applicable in regard to non-disclosure. For present purposes it is sufficient for me to summarise what I conceive to be the essential principles pertaining to this topic and which principles have a bearing on the decision *in casu*:

1. The obligation to make disclosures in a pre-contractual setting will only arise if there is a duty to disclose.
2. That duty only arises in certain specific circumstances. The most notable are the contracts which were formerly termed *uberrimae fidei*. The best example is a contract of insurance where the law recognises the insurer's reliance on disclosure by the proposer for insurance of all material facts bearing on the risk to be undertaken by the insurer.
3. Apart from the above category of contracts the duty to disclose may arise in any other contractual setting and this will be judged having regard to the particular circumstances of the case. An example of such a duty arising is illustrated by the cases which refer to an "involuntary reliance" by one party on the other for information material to making his decision to contract or not. The obligation to disclose latent defects in the *merx* of the law of sale is but one illustration of parties' involuntary reliance on the other to disclose material information. In other contracts after the examination of the circumstances one may find as has been put by Millner in the often-quoted article in 1957 *SALJ* on fraudulent non-disclosure 177 at 189:

"Such an examination may reveal the involuntary reliance of the one party on the frank disclosure of certain facts necessarily lying within the exclusive knowledge of the other such that, in fair dealing, the former's right to have such information communicated to him would be mutually recognized by honest men in the circumstances."

The learned writer then goes on to observe:

"Whether there is, in a particular case, that special relationship of dependency or trust which gives rise to a duty of disclosure must rest ultimately on judicial interpretation of the norms of social behaviour."

4. The non-disclosure must in the circumstances have been material, that is to say, that a reasonable person in the position of the contracting party would not have concluded the contract if he/she had known those facts.

5. A person who knowingly withholds information which he/she is under a duty to disclose is said to be fraudulent and his concealment or silence is “designed” and calculated to induce the other to conclude the contract.

Counsel for the plaintiff conceded that fraud in the sense mentioned has not been proved. The plaintiff accordingly relies on a negligent non-disclosure. It is therefore necessary to determine whether such a cause of action is open to it.

6. It is now established by our authorities that a non-disclosure can occur in circumstances where a person can be said to be negligent as opposed to fraudulent (*McCann v Goodall Group Operations (Pty) Ltd* 1995 (2) SA 718 (C) especially at 726).

Here we postulate that in the circumstances as outlined above a duty to disclose has arisen and one of the contracting parties in breach of his aforesaid duty negligently fails to make the disclosure to the other party. To decide whether negligence is present a court will apply the classic objective standard of the *bonus paterfamilias* and ask the question whether the reasonable man in the circumstances that the particular contracting party found himself in would have made the disclosure. This reasonable man is a person of normal memory, neither given to forgetfulness nor absent-mindedness. In addition I accept that, in assessing particularly whether Buchberger was negligent in failing to disclose the existence of the telex of 29 January 1996 I must not disregard the fact that he had special skills and knowledge in the particular field so that his conduct is to be tested against that of the hypothetical, reasonable “expert” in his position. If the answer is in the affirmative then a failure to disclose is negligent and therefore unlawful.

Buchberger testified that he is a marine engineer employed by Ernst Russ which carries on business as a ship-management and ship-owning company. His designation in this company is that of chief superintendent. Buchberger came to Durban on 26 March 1996 to supervise certain engine repairs on the “Afris Pioneer”. He acknowledged that his initials appeared on the telex dated 29 January 1996. He said that it is normal practice in his office that all outgoing communications would pass the three desks of the superintendents. Upon reading these messages he felt happy there were no problems on the “Afris Pioneer’s” derrick and he was pleased to receive a message from another shipping line, namely Unicorn. By reference to the photographs presented in this case he was able to explain what was meant by the four screws failing on the cover plate which would have caused the heel-pin to move out of position.

Buchberger gave the following evidence:

“Did you ever find out — try to find out how the heel-pin on this sister ship had failed: No, I had no reason to ask for that.

Did you know the name of this sister ship? — At that time when the accident happened, or at the time when I had seen this communication, for sure not. Not even the name.

You just knew it was a vessel which Unicorn Lines ... (intervention) — Yes. ... had something to do with. Now the cargo gear inspection was carried out on which days: — The cargo gear inspection, as far as I remember, started on the 29<sup>th</sup> — no, on the 28<sup>th</sup>, and was finished on the 29<sup>th</sup>.

And it was carried out by surveyor Stehr? — Mr Stehr, yes. He is a German surveyor for GL.”

Buchberger testified also that on 29 March what is described as a dye penetrant test was applied in the vicinity of the clevis lugs of the gooseneck. No problems were encountered in the course of that test.

On 30 March at about 6am in the morning he learnt of the incident and soon thereafter he went to the vessel where he observed the derrick in its damaged state and took several photographs depicting this. According to Buchberger he drew the conclusion that the damage

had been caused by the negligence of the derrick operator. Buchberger said that representatives of the stevedores were present on board including a surveyor. It is common cause that the plaintiff's surveyor was one Seaman. Buchberger said that he discussed with the plaintiff's representatives what he thought had happened and he expressly blamed the derrick operator employed by the stevedore company for causing the accident. He told everybody that in his opinion the boom was topped up in too high a position and then slewing took place. As far as he could remember no-one challenged his conclusion. Buchberger then gave the following evidence:

“Now at the time that you were looking at what happened on this occasion did your mind go back to what had happened with regard to the heel-pin on a sister vessel a few months before? — No, I was not thinking at that moment for the thing what's happened on the sister vessel.

Did it come into your mind and you excluded it as not being — if you recall Do you remember if you thought about it, or not? — I am quite sure I didn't thought about that.”

On that day at about noon a meeting took place with all the parties concerned. These were the witness Thurlow, the master of the vessel, Captain Ashley Irvine, the cargo supervisor, Captain Seaman, the plaintiff's surveyor, Gontier and also the stevedore foreman. Buchberger was asked what his attitude was at the meeting and he said that his attitude was “to blame the stevedores officially for the damage what happened to the derrick”. In his opinion the stevedore company was responsible to pay the costs. The outcome of the meeting was that the stevedore company accepted the liability. He said that they arranged for a floating crane and for the renewal of the damaged part of the gooseneck at their expense. They instructed IMAC to do the work. He said that was the arrangement and there was no doubt about it. Buchberger then gave the following evidence:

“In your mind, was there any room for further dispute about the liability or fault, or payment between the owners and National Stevedores? — No. It was arranged. Oh, first it was agreed and the repair have been arranged, and I was looking forward that they will do everything to remedy the derrick, which they did. They did.

Were you surprised at this attitude on the part of the stevedores? — To be honest, I was very surprised.”

Gontier, a marine engineer, said he was present at the meeting when arrangements were made with regard to the repair of the derrick. He represented the repairer IMAC. His understanding was that the stevedores gave IMAC the job and therefore they were liable to pay for the repairs. He testified as follows:

“And did you have any understanding at the meeting as to whether this was on the basis that the stevedores acknowledged their responsibility to effect the repairs or just some holding arrangement? — No, the stevedores – I was under the impression that the stevedores accepted liability and that's why they undertook to award the contract to us.

...

Were you in any way surprised at the attitude of National Stevedores, namely that they would arrange for the payment of the repairs? — Yes, I was a little bit surprised that they basically accepted – their representative *Mr Duane Seaman*, *accepted that they were at fault and that's why, during the discussions, we were given the go-ahead to manufacture new parts.*

...

Mr Gontier, what was it that surprised you about their attitude? — I don't think it's normal that anybody just admits liability for something that they themselves could not even be sure of, that they were at fault.

Did you ask anybody why they had made this admission so quickly? — Yes, I asked Mr Seaman why he was so sure that the stevedores were at fault and he basically gave his ... (intervention)

...

What did Mr Seaman say, Mr Gontier? — I don't recall exactly what he said, but it was basically that they had accepted that the stevedores were at fault and **we were to go ahead and repair it as soon as possible**" (my emphasis).

To complete this summary of the relevant evidence the testimony of Thurlow is also important. Thurlow appears to me to be one of the most unsatisfactory witnesses in this case. The weight of the evidence is that Thurlow agreed to pay for the repairs on that day and did so unequivocally. One gains the impression that he attempted to backtrack on this during his evidence. In chief it's put to him that it has become common cause that an agreement was concluded between the plaintiff and the owners of the vessel and he is asked whether he had anything to do with this and he acknowledged that he did. He then went on to say:

"That the plaintiff was responsible. At that point in time I took the decision whilst I didn't feel that anybody had categorically proved we were responsible, that one should endeavour to minimise the exposure, bearing in mind that at this point in time the 'Afris Line' were a fairly large client."

He was asked who instructed IMAC with the repairs and he said he did. Thurlow also acknowledged that at all times during this meeting the ship owners' representatives took the view that the plaintiff was responsible for the damage. Later under cross-examination Thurlow said:

"So what – are you suggesting that because Afris Lines was worth so much to you, you wanted to pay for this in order not to upset Afris Lines? Is that what you're saying? — No, that's not what I'm saying. I am saying that we took a commercial decision that based on the possibility that we were negligent, that we had taken all steps to protect the client's interests.

The client being Afris Lines? — Correct.

And your interest in protecting Afris Lines' interests, was to ensure that they didn't get that cross with the plaintiff, because they could take the work away? They could say, 'We're going to some other stevedoring concern', and you will lose the contract? — That's correct.

And just how great or how small the possibility was that in fact ultimately the plaintiff would be demonstrated to be at fault, wasn't that really an issue?— Sorry, I don't follow your question.

What I am saying is your primary concern was to ensure that Afris Lines was not upset? — I view that as correct, yes.

And if you agreed to pay all of these costs, that would reduce the prospects of Afris Lines being very upset? Correct? — If we were negligent, yes."

Later under cross-examination the witness said the following:

"So what was the possibility that you would be liable? On what did you base the conclusion that there was a possibility that you were liable? — The fact that there was a derrick that had collapsed over a hatch and that there was a container hanging in mid air over the hatch.

...

Right. Now could you tell me or tell the Court what it was, apart from if – and if there was something else? When I asked you, 'Why did you consider there was a possibility of liability?', you said, 'Because there's a derrick broken and a container hanging over the hatch.' — And that was the opinion of Duane Seaman that there's a possibility of liability."

It is of some significance that Seaman was not called as a witness by the plaintiff. An inference can probably be drawn that Seaman, who after all was the plaintiff's expert at the meeting, would have confirmed at that time that in his opinion he believed the plaintiff was responsible for the damage caused to the derrick.

In my view, the effect of the evidence on this part of the case viewed cumulatively is as follows: Buchberger, the defendant's representative, had viewed the damage and to his mind it was a case of *res ipsa loquitur* – the damage had obviously been caused by the operator's negligence. He went into the meeting to assert this position and did so. This was not a case where parties were negotiating contracts such as the sale of shares. It was what one might term an adversarial encounter. The defendant adamantly maintained that the operator was negligent. This was based on what Buchberger had seen. The plaintiff represented by Thurlow, who in turn was probably advised by Seaman, conceded and accepted the defendant's assertion. It is now suggested that in these circumstances Buchberger ought to have searched in the recesses of his mind for some reasons favouring the notion that the plaintiff was not liable. Counsel for the plaintiff says that a reasonable man in his position would have remembered the exchange of telexes. This reasonable man would have cast aside his strong view held about the operator negligence and would have said words to this effect:

“I think I must tell you that three months ago we got a notification that the mv ‘Pongola’ operated by Unicorn Lines suffered a crack to the heel-pin of its derrick. We checked the derrick on the ‘Afris Pioneer’ and made certain adjustments to the heel-pin.”

I am of the opinion that in the circumstances that prevailed this notional reasonable man would not have had cause to remember the exchange of telexes, nor would he have thought that they were relevant given that it was the unanimous view of all concerned that the operator was to blame for the damage and moreover given that no mention was made in the evidence about any discussion pertaining to inherent defects in the derrick or defective maintenance thereof. The reasonable man in the position of Buchberger would undoubtedly have remembered the recent maintenance checks on the operation of the derrick. This would have reinforced his view that the damage caused on 30 March 1996 was a result of operator negligence. He would not have given any thought whatsoever to the “Pongola” incident.

I am therefore of the view that in the circumstances that prevailed leading up to the plaintiff's acknowledgement of liability no duty arose on the part of Buchberger to make the alleged disclosure or any other disclosure. On the assumption that a duty did arise he has not been shown to have been negligent. Counsel for the plaintiff has referred to passages in the evidence of Forbes and Olmstead which according to counsel illustrate the relevance between damage to the heel-pin on the “Pongola” and the damage that occurred in this case, namely of the vertical pin of the derrick. He says out notional reasonable man would have made a connection between the two, would have recalled the telexes and felt obliged to tell the plaintiff about them.

Forbes, one of the defendant's witnesses is recorded as having said the following in a re-examination:

“Mr Forbes, you've said just a few minutes ago that when there's a failure, for example, of the horizontal pin, it would be relevant to look at the other aspects of the derrick if there'd been a failure. — Of the horizontal pin, yeah.

Now, I just want you to deal with this specific issue, and that is if, as we know in January of 1966, it is reported that the heel-pin, that's the horizontal pin, failed in a sister vessel, whether you would regard that as being of any particular relevance in assessing the failure of the vertical goose-neck pin on another vessel at the end of March that year. — It wouldn't lead me to any suspicion providing there was no problem encountered with the heel-pin on the vessel that I was concerned with. Failures occur on ships on many, many different parts of equipment and you cannot,

because something's happened on one ship, immediately start stripping and taking out of service other ships. Every case must be dealt with on its own."

This piece of evidence is to my mind the answer of counsel's contention. In the instant case some work was done to the heel-pin on the "Afris Pioneer" as a result of the telexes. This was the end of the matter as far as all were concerned. The reasonable man in the position of Buchberger would not have given it any thought on the day in question given the prevailing circumstances that I have already outlined.

Turning finally to the issue of materiality counsel emphasizes the *ipse dixit* of Thurlow that he would not have entered into the contract had he known about the telexes. I am persuaded that this is an afterthought on the part of Thurlow. As indicated he was an unsatisfactory witness and this is also highlighted by the learned Judge in the court *a quo* when he quoted the following passage from Thurlow's evidence-in-chief:

"M'Lord, I think there is – there is little doubt that if that information had been disclosed on the morning of the 30<sup>th</sup> March, that there had been *numerous failures of this kind in the past*, then I do not believe our company would have taken the same views that we did" (my emphasis).

I am in full agreement with the reasoning of the learned Judge in the court *a quo* which he set forth as follows:

"In all the circumstances, I am not satisfied that the plaintiff proved, on a balance of probabilities, that had Buchberger told Thurlow that on 29 January 1966 the heel-pin of the heavy lift derrick on a sister vessel had cracked during operation, causing damage to the vessel's structure in the range of hatch no. 2, Thurlow would not have given the instruction to IMAC to carry out the repairs. It is equally probable, in my view, that he would, firstly, have asked what the relevance was of the damage to the 'sister vessel' and whether it was damage to the same part. He would have been told by Buchberger that it was not damage to the same part, and that he did not consider it relevant. He would probably have consulted the plaintiff's expert, Seaman, who may, in all probability, have said that, without knowledge of the cause of the damage to the mv 'Pongola', he could not say whether it was relevant. Had the cause of the damage to the vertical pin on the mv 'Afris Pioneer' still been left in doubt and had Seaman persisted in his opinion that there was a possibility that it was caused by the negligence of the operator, it is equally possible, in my view, having regard to the other factors that Thurlow took into consideration, that he would still have authorised the repairs by IMAC, in order to control the cost and not incur the displeasure of the plaintiff's client, Afris Lines.

I am, therefore, of the opinion that the plaintiff also did not prove, on a balance of probabilities, that it would not have instructed IMAC to carry out the repairs had it known of the damage to the mv 'Pongola'."

It follows, in my opinion, that the learned Judge correctly absolved the defendant from the instance and accordingly the appeal fails to be dismissed. I ought to draw attention to the fact that the Court *a quo* reserved the question of the qualifying fees of the expert witnesses who testified on behalf of the defendant. It has been suggested at the hearing before us that would now deal with this issue and obviate a renewed hearing before the Court *a quo*. We decline the invitation as we are in no better position than the Court *a quo* was at the conclusion of the trial.

The appeal is dismissed with costs.

(Hurt and Patel JJ concurred in the judgment of Levinsohn J.)