

IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

Case Number: 1099/2007

In the matter between:

SHERIFF FOR KRUGERSDORP

Applicant

and

UNITED AVIATION SERVICES

1st Claimant

and

TRANS AIR CONGO S.A.R.L

2nd Claimant

JUDGMENT

MOKGOATLHENG, J:

INTRODUCTION

- (1) The second claimant seeks an order setting aside the attachment of a Gulfstream G159 aircraft ("*The aircraft*") with registration number 25-ALX effected by the Sheriff on the 29 November 2007.

- (2) The first claimant as the plaintiff issued summons against Tramon Air (Pty) Ltd, the defendant, for payment of the sum of 36, 204.12 USD for services rendered at the instance of the latter. The first claimant in terms of *Rule 31(5)* applied for and was granted default judgment against the defendant.
- (3) Pursuant to a warrant of execution, the Sheriff on the 29 November 2007 attached the aforementioned aircraft. The first claimant alleges that the ownership of "*The aircraft*" vested in the defendant at the time of its attachment at Lanseria Airport.
- (4) The second claimant in terms of *Rule 58(3)(b)* instituted these interpleader proceedings alleging that it was the lawful owner "*The aircraft*" and accordingly, seeks the upliftment of the aforementioned attachment.
- (5) Ahmed El-Hage the managing director of the second claimant alleges that on the 12 September 2006 the latter concluded a contract with the defendant in terms whereof it purchased "*The aircraft*" from the defendant for the sum of 450, 000.00 USD.
- (6) The second claimant alleges that the sale became *perfecta* on 4 April 2007 on payment of the outstanding balance, that pursuant thereto from the 24 April 2007 the ownership of "*The aircraft*" vested in it.

- (7) The second claimant contends that when the Sheriff attached "*The aircraft*", the defendant did not have any right, title and interest in the said aircraft because ownership vested in it.
- (8) The second claimant alleges that "*The aircraft*":
- (a) was on the 15 October 2007 flown from outside the Republic of South Africa to Lanseria Airport in order that repairs be effected on it at its instance as the owner thereof and for its own account;
 - (b) "*is presently still registered with the South African Civil Aviation Authority in the name of Tramon Air (Pty) Ltd the defendant as a result of a delay to obtain the necessary South African Customs and South African Revenue Services clearances to have the aircraft deregistered*";
 - (c) it is a South African customs requirement that "*The aircraft*" be present in the Republic of South Africa for inspection and other regulatory requirements before a clearance certificate is issued, that pertinently it was for this reason that it was returned to the Republic of South Africa;
 - (d) the sale was *perfecta*, in that the *essentialia* of the contract were fully complied with, and delivery of "*The aircraft*" was effected, that consequently the second claimant was the common law owner of "*the aircraft*".

- (e) the fact that “*The aircraft*” was still registered by the South African Civil Authority in the name of the defendant, the said registration does not detract from the legality of the second claimant’s ownership thereof; and
 - (f) the definition of “owner” in *section 1 of the Aviation Act 74 of 1962* “*The Act*” does not necessarily purport to refer only to persons who are the actual common law owners of an aircraft.
- (9) The first claimant alleges that;
- (a) “*The aircraft’s*” ownership vests in the defendant because at the time of its attachment, it was registered with the South African Civil Authority in defendant’s name and remains so registered, despite the second claimant’s allegation of having purchased same from the former;
 - (b) *section 1 of “The Act” defines an “owner” of an aircraft as the person in whose name such aircraft is registered that consequently, the second claimant cannot lawfully be the owner of “The aircraft” because it is not registered in the second claimant’s name;*
 - (c) the sale was not *perfecta* because “*The Total Purchase Price*” has not been paid in terms of the agreement and the necessary documents to effect registration have not been delivered in terms

of the agreement,” that consequently the aircraft cannot be registered in the name of the second claimant; and

- (d) there is no confirmatory affidavit from the defendant (the seller) to confirm that the sale was *perfecta*, consequently there is no proof that the second claimant complied with the terms of the contract.

ANALYSIS OF EVIDENCE

- (10) *Section 1 of the Aviation Act* defines owner as follows:
“*Owner,*” in relation to an aircraft or aerodrome, means the person in whose name the aircraft or aerodrome is registered, and includes any person who is or has been acting as agent in the Republic for a foreign owner, or any person by whom the aircraft, or aerodrome is hired at the time”.
- (11) There is irrefutable proof that the second claimant purchased “*The aircraft*” from the defendant. The outstanding purchase price balance was paid on the 4 April 2007. “*The aircraft*” was delivered to the second claimant on payment of the deposit to the defendant. The second claimant has furnished proof of payment of the agreed purchase price of 450, 000.00 USD.
- (12) It is opportunistic for the first claimant to contend that the second claimant has only paid the selling price and not “*the Total Purchase Price,*” that because the second claimant has not made an allegation of payment of “*the Total Purchase Price*” and has not provided proof of

payment thereof in terms of *Clause 1*, the sale is therefore not *perfecta*. This contention has no merit.

(13) *Clause 1*, provides as follows:

PURCHASE PRICE:

Selling price of Aircraft 450, 000.00 USD

Plus any and all applicable taxes, duties or fees including sales, transfer and goods service taxes relating to the purchase of the Aircraft (“the Total Purchase Price”).....”

The caveat predicating the concept, “the Total Purchase Price” is the phrase plus any and all applicable taxes, duties, or fees including.....”(my underlining)

(14) *Clause 3* provides that *CLOSING DATE:*

Closing (payment in full and transfer of title) shall occur at a location agreeable to both parties with the execution and delivery of this agreement and all payments received by seller as per Attachment “A”.

(15) *Attachment “A”* reflects that the second claimant paid the outstanding balance of 45, 000.00 USD on the 4 April 2007. The second claimant was in terms of the contract obliged to pay the outstanding balance on the 2 March 2007, and did not strictly adhere to the agreed payment regime in terms of *Attachment “A”*.

(16) The first claimant is a third party and does not have privity of contract with both the defendant and the second claimant, consequently does not have the *luco standi* to query whether the payments made by the

second claimant In Euros are the equivalent to 450, 00.00 USD. The decisive fact is whether there was consensus between the contracting parties that the agreed purchase or selling price has been fully paid. There is no evidence to gainsay the second claimant's evidence in this regard.

(17) The first claimant's counsel argued that "*The aircraft*" was not registered in the second claimant's name because there was a possibility of non-compliance by the latter with the terms of the contract, that this was possibly the reason why the defendant did not furnish the second claimant with the Certificate of Deregistration and the Export Certificate of Airworthiness. This contention is not borne out by the object facts.

(18) *Clause 4 of the contract provides DELIVERY PF AIRCRAFT:*

"The aircraft shall be delivered to purchaser on the date and location agreed upon in Section 3.....;

4(1).....

(411).....

Purchaser at the time of delivery shall

(i)

(ii) Accept delivery of Aircraft and deliver to Seller;

(a) a delivery acceptance certificate ("Delivery Certificate")

(19) *Clause 5, Evidence of Export provides:*

"Upon final payment of the aircraft, Seller can provide to the Purchaser;

- (i) *the Certificate of Deregistration, and the Export Certificate of Airworthiness per Purchaser's instructions, or*
- (ii) *Purchaser will keep aircraft under South African registration if allowed by South African Authorities."*

(20) In terms of *Clause 5*, the second claimant had the option either to register "*The aircraft*" in the Republic of South African or in a foreign country. The second claimant had the discretion to request the Certificate of Deregistration and the Export Certificate of Airworthiness from the defendant when ever it chose. The contention that the second claimant was unable to register "*The aircraft*" in its name because the defendant had not furnished it with the aforementioned documents is accordingly not sustainable having regard to *Clause 5*.

(21) The second claimant states that the reason "*The aircraft*" is still registered with the South African Civil Aviation Authority in the name of the defendant is because there has been a delay in obtaining the necessary South African Customs and South African Revenue clearance to have "*The aircraft*" deregistered. There is no reason to doubt this plausible explanation.

(22) The first claimant's counsel misconstrues the import of *section 1 of "The Act"* by contending that delivery of "*The aircraft*" is not relevant for the determination ownership, that registration in terms of *section 1 of "The Act"* is decisive in this regard.

- (23) An analysis of *subsection 1* shows that “owner” in relation to an aircraft does not necessarily and exclusively refer only to the person in whose name “*The aircraft*” is registered. “Owner” also includes any person who is or has been acting as an agent in the Republic for a foreign owner and also refers to any person by whom “*The aircraft*” is hired at the time of registration.
- (24) It is patent that the definition of an “owner” for purposes of “*The Act*” does not restrict the registration of “*The aircraft*” only in the name of the lawful owner. It is evident that even an agent representing a foreign principal but not having the authority to dispose of the *dominium* to an aircraft, may have “*The aircraft*” registered in his or her name, so too, any person who has hired an aircraft can for purposes of *section 1* be a person in whose name “*The aircraft*” is registered.
- (25) It appears that registration in terms of the *section 1* is firstly intended for administrative purposes, secondly to facilitate the efficacy of civil and criminal proceedings arising from the contravention of “*The Act*”.
- (26) The interpretation of “owner” in *section 1*, notionally also encompasses representative registration on behalf of the actual owner or any person claiming title under the actual owner. This notion is evident from the wording of *section 13(3)* of “*the Act*” which provides: “*For the purposes of this section, the expression “owner” means the actual owner of an aircraft, and includes any person claiming through or under him.....*” *Section 13 (3)* demonstrates that “*The Act*” draws a clear distinction between “*actual owner registration*” and “*representative registration*” on

behalf of an owner or any person claiming through or under the actual owner.

(27) The first claimant contends that because no papers were filled by the defendant, one is unable to determine if the agreement is still in effect or if it has been cancelled. It is irrelevant and not decisive that the second claimant has not attached a confirmatory affidavit from the defendant. The first claimant has no privity of contract with the defendant or the second claimant. Consequently, it cannot impose its perceived interpretation and meaning of the contract on the second claimant or the defendant.

(28) Where parties to a contract are *ad idem* on its meaning, it is not open for a third party to contend for or impose a different meaning to the terms of that contract even if, the third party's interpretation does accord with the apparent meaning of the impugned contract.

(29) In *Anssenkehr Farms (Pty) Ltd v Trio Transport CC 2002 (4) SA 483 at page 493C-494B* the Court held among others that:

"Where ("parties to a contract") agree on its meaning, even though the provision appears objectively to reflect a different understanding, it would be absurd to insist on binding them to a term upon which neither agrees only because of a third party's insistence on the reliance on the apparent meaning of the provision".

(30) There is no evidence that the first claimant relied on the apparent terms of the contract between the defendant and the second claimant to its

detriment which exigency would necessitate the invocation of an estoppel in its dealings with the defendant.

THE ORDER

- (31) In the premises;
- (a) The attachment of the Gulfstream Aircraft G159 registration number ZS-ALX; made pursuant to the warrant of execution issued on the 12 April 2007 is set aside.
- (b) The first claimant is ordered to pay the second claimant's costs.

Signed at Johannesburg on the 20th February 2009.

MOKGOATLHENG J
JUDGE OF THE HIGH COURT

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