REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 6151/2018

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

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SIGNATURE

21/03/2018
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DATE

Handed Down on 19/03/2018

In the matter between:

EXPORT DEVELOPMENT CANADA	First Applicant
STONERIVER MSM 9631 AIRCRAFT DESIGNATED ACTIVITY COMPANY	Second Applicant

and

WESTDAWN INVESTMENTS PROPRIETARY LIMITED	First Respondent
OAKBAY INVESTMENTS PROPRIETARY LIMITED	Second Respondent
ATUL KUMAR GUPTA	Third Respondent

CHETALI GUPTA	Fourth Respondent
SOUTH AFRICAN CIVIL AVIATION AUTHORITY	Fifth Respondent
NATIONAL PROSECUTING AUTHORITY	Sixth Respondent

J U D G M E N T

KATHREE-SETIOLANE

[1] This application concerns the grounding, return and storage of a Bombardier Global 6000 aircraft with registration mark ZS-OAK ("the Aircraft") that is registered in South Africa. The Aircraft is owned by the second applicant, Stone River MSN 9631 Aircraft Designated Activity Company ("Stone River"), which has its principal place of business in Dublin, Ireland. Stoneriver leased the Aircraft to the first respondent, Westdawn Investments Propriety Limited ("Westdawn"), in terms of an aircraft lease agreement ("the Lease Agreement"). Westdawn is part of the Gupta group of companies.

[2] The first applicant, Export Developments Canada ("EDC"), provided Stoneriver with the funding to purchase the Aircraft. EDC is a state-owned enterprise wholly owned by the Government of Canada. Its principal place of business is in Ottawa, Canada. The funding arrangements are regulated by a

facility agreement ("the Facility Agreement") concluded between EDC, Stoneriver and the second respondent, Oakbay Investments Propriety Limited ("Oakbay"), which is also part of the Gupta group of companies. Stoneriver is required, under the Facility Agreement, to make quarterly repayments of the loan amount to EDC using the rental it receives from Westdawn.

[3] Oakbay is the corporate guarantor for the repayment of the loan under the Facility Agreement. The third and fourth respondents, namely Mr Atul Gupta and his wife Mrs Chetali Gupta (Mr and Mrs Gupta), are the personal guarantors. Oakbay is one of the main operating companies in the Gupta group. Oakbay controls Westdawn, and Westdawn is controlled by Mr Atul Gupta and Mrs Chetali Gupta.

[4] To manage and secure the applicants' rights arising from the transaction, the Facility and Lease Agreements contained numerous rights of security and triggers which would constitute events of default, entitling the applicants to terminate the leasing arrangement and take possession of the Aircraft. In other words, each of the events of default under the two agreements constitute a repudiation of such agreements. The applicants allege that more than a dozen events of default had come to their attention between October 2017 and December 2017, as a result of which Westdawn, Oakbay and Mr and Mrs Gupta ("the Gupta respondents") were in breach of the Lease Agreement and the Facility Agreement. The applicants accordingly accepted the repudiation and terminated the leasing of the Aircraft on 13 December 2017. In their notice to terminate the leasing of the Aircraft, the applicants instructed Westdawn to redeliver the Aircraft to Stoneriver.

[5] Westdawn failed to comply with the December notice and the Aircraft was not returned to Stoneriver. It, however, launched an action in the English Courts challenging the lawfulness of the cancellation of the two agreements. The action is currently pending in the English courts under claim number BL-2017-000642 ("the English proceedings").

[6] The applicants seek, pending the final determination of the English proceedings, an interim interdict to have the Aircraft grounded and returned to a safe location to be stored. The applicants will bear the costs of storage and maintenance and no party will have the right to operate or dispose of the Aircraft during the operation of the interim interdict.

Urgency

[7] The applicants brought this application as an urgent application set down for hearing in the urgent court on 6 March 2017. By agreement between the parties, the Deputy Judge President of this Division case-managed the matter and allocated it to me for hearing as a one day special allocation to be heard on 9 March 2018. In the interest of completing the matter in a day, I enrolled the matter on my role and heard argument on the question of urgency and the merits together. This notwithstanding, urgency remained an issue and the applicants were required to demonstrate that they were justified in setting the matter down for hearing in the urgent court.

[8] The purpose of urgent proceedings is to enable a court to come to the

assistance of a litigant in circumstances where the litigant will be unable to obtain relief in the ordinary course.[1] The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. In *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* (quoted with approval by Wepner J in In re: Several Matters on the Urgent Court Roll),[2] Notshe AJ held:

"It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able to obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard."

[9] Urgency is decided by reference to the applicant's papers alone.[3] Nowhere in their founding papers do the applicants pertinently allege that they will not be able to obtain substantial redress in due course. The Gupta respondents latch onto this omission contending that the applicants' failure to make this allegation in their founding papers indicates that they can get substantial redress in another court (in this case the English Courts) in due course, since they intend to defend the pending action there. They contend that should the English proceedings be subsequently decided against the applicants; the Aircraft would have to be returned to Westdawn. In addition,

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[1] *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd* [2011] ZAGPJHC 196 para 6.
[2] *In re: Several Matters on the Urgent Court Roll* 2013 (1) SA 549 (GSJ) para 7
[3] *Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W) at 586G

they point out that the applicants intend to file a counterclaim before the English Courts for the permanent return of the aircraft. This, so they contend, confirms that on the applicants' own understanding of the facts - adequate redress in due course is at their disposal. The respondents accordingly contend that the matter be struck from the roll for lack of urgency.

[10] The "formulaic recitation" by an applicant, in its founding papers in an urgent application, of the phrase "will not otherwise be afforded substantial redress in due course" which appears in rule 6(12)(b) of the Uniform Rules, will not if unsupported by the facts entitle the application to be enrolled and dealt with as one of urgency. Likewise, where an applicant omits to pertinently allege this phrase in its founding papers, but from an examination of the facts it is clear that the applicant will not be able to obtain substantial redress in an application in due course if the matter is not dealt with on an urgent basis, then its failure to do so is immaterial. This is because whether or not an applicant is in a position to obtain substantial redress in due course can only be determined after giving consideration to the facts and circumstances of a particular case.

[11] The facts in the current matter make it abundantly clear that unless this application is enrolled for hearing in the urgent court, the applicants will be unable to obtain substantial redress in an application in due course in a court either in the country or outside. The applicants have terminated the leasing of the Aircraft. Should it be found in the English proceedings that the termination was lawful, the applicants would be entitled to the return of the

Aircraft in the condition it was in when the termination occurred, since the Gupta respondents would not have been entitled to use the Aircraft thereafter.[4]

[12] In the nature of things, the condition of the Aircraft will deteriorate if the Gupta respondents continue to use it. Where an applicant for interim relief is the owner of the assets that are sought to be recovered, our courts have held that "there is a de facto presumption that the applicant will suffer irreparable harm if the interdict is not granted, until the contrary is shown".[5] That is precisely the case here.

[13] The risk of damage to the Aircraft is reinforced by the fact that the applicants were party to a multiparty agreement with Execujet, the operator of the Aircraft, that afforded them various rights against it. Execujet terminated the contract in order to protect itself against reputational damage of being associated with Westdawn, which is owned by the Gupta family (and Oakbay and Mr Atul Gupta) who have been embroiled in high profile media matters of corruption and state capture in the recent past. Consequently, the applicants have no contractual nexus with the new operator that has apparently replaced Execujet.

[14] The risk of damage to the Aircraft is further reinforced by events that occurred in February this year. The most significant of these is that

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[4] *BW (Diesel Distributors) Pty Ltd v Chivell* 1955 (1) SA 624 (N) at 625.
[5] *Dorbyl Vehicle Tracking and Finance Co (Pty) Ltd v Northern Cape Tour and Charter Service CC* [2001] 1 All SA 118 (NC) para 16.14. *See also SA Taxi Securitisation (Pty) Ltd v Chesane* 2010 (6) SA 557 (GSJ) para 30.

subsequent to the applicants' request for information on the Aircrafts' location on 4 February 2018, Westdawn switched off its public tracking of the Aircraft. This, as explained by the applicants on their papers, has created an extraordinary situation in which the applicants are deprived of any ability to locate the whereabouts of the Aircraft that EDC has financed and Stoneriver owns.

[15] As is apparent from a letter received from Westdawn's English solicitors (Jones Day) dated 5 February 2017, the Aircraft had travelled to Dubai and India in that week and was located at the Indira Gandhi Airport in Delhi. They were, however, instructed that the Aircraft would be in further use in that week. What is clear from this is that the Aircraft is being used by the Gupta respondents to fly to unknown destinations, which is not denied by them. This increases the risk of it being damaged.

Risk of forfeiture

[16] There is crucially also a risk of forfeiture of the Aircraft under the Prevention of Organised Crime Act 121 of 1998 ("POCA"). Although the Gupta respondents say that the switching off of the tracking device "is not unreasonable" as the applicants have been advised by Jones Day of the whereabouts of the Aircraft (which is not correct), the only explanation they offer for their conduct is that "the applicants' express intention is to take possession of the aircraft". But this explanation does not bear scrutiny since the applicants have never suggested that they intend to resort to extra-curial means in order to take possession of the Aircraft. A more obvious

explanation is that the Gupta respondents switched off the public tracking so that nobody will be able to ascertain the whereabouts of the Aircraft.

[17] This begs the question: why would the Gupta respondents not want anyone to track the whereabouts of the Aircraft? This makes for the pungent possibility that this was done so that the Aircraft can be used for unlawful purposes. Although the Gupta respondents dismiss this as "baseless speculation that [does] not warrant a response", they conspicuously do not say that the Aircraft is not being used for unlawful purposes, and they do not give an undertaking that the Aircraft will not be used for unlawful purposes in the future. Since the Gupta respondents must know whether the Aircraft is being used (or will be used) for unlawful purposes, they cannot abdicate responsibility by saying that "the applicants have no evidence that the aircraft is being used in any illegal activity."

[18] What is clear from all of this is that there is an increased risk that the Aircraft may be forfeited under POCA with the result that the applicants will be deprived of their financial interest in the Aircraft. Significantly, in their answering affidavit, the Gupta respondents say that "the fact that the Facility and Lease agreements may have been concluded at the same time [as the Estina Dairy Project] and that monies may have been paid to the applicants thereafter is not itself proof that the respondents were paid using the proceeds of crime". However, the Gupta respondents do not make a positive allegation that the payments made to Stoneriver under the Lease Agreement did not derive from the proceeds of crime. Moreover, the answering

affidavit does not contain a positive allegation that the Aircraft has not been used for unlawful purposes (or will not be used for unlawful purposes).

[19] The civil forfeiture regime in chapter 6 of POCA allows for property to be forfeited to the State if it is the instrumentality of an offence referred to in Schedule 1 or if it is the proceeds of unlawful activities. If property is forfeited under chapter 6 of POCA, the order operates *in rem* and affects all parties who have an interest in the property. The remedy of an "innocent owner" is to apply for his or her interest in the property to be excluded from the forfeiture order. In order to do so, however, the "innocent owner" has to show:

(a) that he or she neither knew nor had reasonable grounds to suspect that the property is the proceeds of unlawful activities; or

(b) that he or she neither knew nor had reasonable grounds to suspect that property is the instrumentality of an offence and has taken all reasonable steps to prevent the use of the property as an instrumentality of an offence.

[20] Should the National Director of Public Prosecutions apply to have the Aircraft forfeited in terms of chapter 6 of POCA, the applicants would need to rely on the "innocent owner" defense in order to have their interest excluded from the forfeiture order. However, the applicants may well be deprived of their ability to rely on this defense unless interim relief is granted as a matter of urgency. Simply put, the applicants face the increasing risk that they may be deprived of their interest in the Aircraft unless interim relief is granted.

Reputational harm

[21] If interim relief is not granted, the applicants will suffer reputational harm by virtue of being associated with the Gupta respondents through their continued use of the Aircraft. The applicants have explained, with considerable understatement, why they do not wish to follow in the footsteps of Bell Pottinger, KPMG South Africa or HSBC. The Constitutional Court has held that harm "connotes a common-sensical, discernible or intelligible disadvantage or peril that is capable of legal protection".[6]

[22] It follows from this that the applicants will suffer such harm if interim relief is not granted and if they succeed in the English proceedings. The harm will be irreparable since "the effects or consequences cannot be reversed or undone".[7] I accept that irreparable harm does not equate to substantial redress as contemplated in Rule 6(12)(b), as substantial redress is something less. But where an applicant in an urgent application is able to demonstrate on its papers that it has a well-grounded apprehension of irreparable harm if an interim interdict is not granted, that would suffice to meet the threshold of the absence of substantial redress that is required for an urgent hearing.

[23] In the circumstances, I am satisfied that the applicants have demonstrated on their founding papers that the matter is urgent as they are unable to obtain substantial redress at a hearing in due course in either this Court or the Court of England and Wales.

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[6] *Tshwane City v Afriforum* 2016 (6) SA 279 (CC) para 56.
[7] *Tshwane City v Afriforum* at para 57.

The urgency is not self-created

[24] The Gupta respondents, however, contend that the urgency is self-created by the applicants because at the time of the December notice they were, as they are now, not in possession of the Aircraft, yet they did nothing to recover possession of the Aircraft until 15 February 2018, having waited 2 months.

[25] They furthermore contend that the applicants' reliance on the "January breaches" is similarly no good, since those breaches occurred in December 2017 and January 2018. They contend that it is hard to believe that given the protracted adverse publicity in relation to the conduct of the Gupta respondents which the applicants would have been well aware of, that the events relied upon only came to their attention in February 2018. They say that if this is to be believed, then it underscores the fact that the applicants' urgency is self-created, as they seek urgent relief in circumstances where they were not diligent in monitoring their counterparties nor acting sooner than February 2018 – when they ought to have been aware of the events of breach.

[26] The Gupta respondents furthermore point to the applicants' admission that the true motivation for them having recently kicked into high-gear, is on account of the "recent" adverse media coverage that has been directed at the the, and which the applicants clearly seek to escape by distancing themselves from them. It is notable, they contend, that throughout their relationship, and until the letter of 2 February 2018, the applicants have

enjoyed the financial benefits of their commercial relationship with the respondents – for prolonged periods during which the respondents received the same adverse media coverage.

[27] The applicants argue that the contention of self-created urgency is unfounded as it impermissibly conflates the facts giving rise to the termination of the leasing of the Aircraft with the events supporting the urgent interdictory relief the applicants now seek. They state, in this regard, that they became aware of the relevant events of default in December 2017 and subsequently sent the December notice to Westdawn, terminating the leasing of the Aircraft. They argue that the contention that they should have filed their urgent application immediately after the December notice is without merit, as they had terminated the leasing of the Aircraft and called for its return, as they are permitted to do under the agreements. They say they were entitled, at that stage, to assume that Westdawn would comply with its obligations upon termination. Westdawn, however, decided to institute the English proceedings to challenge the termination.

[28] Applicant's demonstrate further that critical events then came to their attention in January 2018, including the litigation instituted by the Helen Suzman Foundation and Magdalena Franciszka Wierzycka against a number of named respondents, including the Gupta Respondents, for the misappropriation of an amount in excess of R7 billion from Eskom ("Eskom Proceedings") and the POCA proceedings (which are described in paragraph 30(a) below). The applicants sent a termination notice on 25 January 2018 and again sought the redelivery of the Aircraft. They afforded Westdawn an

opportunity to ensure the safe return of the Aircraft, providing two business days in which to confirm the process was underway. Westdawn then gave notice of its refusal to comply with the request on 29 January 2018.

[29] As correctly contended for on behalf of the applicants, their attempts, in the course of January, to avoid having to bring an urgent application before this Court, should not be a ground for refusing to regard the matter as urgent. Where an applicant first seeks compliance from the respondent before lodging an urgent application, it cannot be said that the applicant had been dilatory in bringing the application or that urgency was self- created.

[30] A delay in instituting urgent proceedings is not, on its own, a ground for refusing to enroll a matter in the urgent court. The question remains whether the applicant can be afforded substantial redress at a hearing in due course.[8] The application was launched on 15 February 2018 after the following events had occurred:

(a) On 18 January 2018, the National Director of Public Prosecutions was granted a preservation order over assets of three of the Gupta respondents on that basis that they constituted proceeds of crime. There were media reports suggesting that part of the funds used by the Gupta respondents to make the initial contribution towards the purchase of the Aircraft were also proceeds of crime.

(b) On 4 February 2018, following the applicants' request for information on the location and condition of the Aircraft, the public tracker of the Aircraft was switched off. The current location of the Aircraft is unknown to the

[8] *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd* [2011] ZAGPJHC 196 para 8.

applicants.

(c) The Gupta respondents' response on 5 February 2018 to the applicants' request for information on the condition and maintenance of the Aircraft was wholly inadequate.

(d) On 12 February 2018, the South African Reserve Bank confirmed that the Bank of Baroda intended to leave South Africa (largely as a result of the Gupta scandals).

(e) On 14 February 2018 the DPCI raided the Gupta residence in Saxonwold.

[31] In the course of the above events, it became clear to the applicants that urgent relief was needed, or they would not obtain redress in due course. This according to the applicants is when the "allegations of turpitude and impropriety crystallised" and a reasonable apprehension of substantial and potentially irreparable harm arose, and this application was drawn and launched without delay on 15 February 2018. The applicants point out that following the launching of this application, further events have come to light that bolstered the urgency of this matter.

[32] These included that eight companies that are directly or indirectly owned by the Gupta respondents have been placed into business rescue pointing to a crumbling business empire. In addition to that, as a result of the raids and criminal proceedings, several members of the Gupta family are on the run. The brother of Mr Atul Gupta has been declared a fugitive and officers of Westdawn and Oakbay (including the deponent to the answering affidavit) have appeared in the criminal courts.

[33] South Africa and the various countries to which the Aircraft has been flown in the previous months are all parties to the Cape Town Agreement, [9] which has been domesticated through the Convention on International Interests in Mobile Equipment Act 4 of 2007, on matters specific to aircraft equipment, which was signed on 16 November 2001. Both the Convention and the Protocol have the force of a domestic statute. The Cape Town Convention supports the expeditious hearing of this matter. Article 13(1) of the Convention provides as follows:

"Subject to any declaration that it may make under Article 55, a Contracting State shall ensure that a creditor who adduces evidence of default by the debtor may, pending final determination of its claim and to the extent that the debtor has at any time so agreed, obtain from a court speedy relief in the form of such one or more of the following orders as the creditor requests:

(a) preservation of the object and its value;

(b) possession, control or custody of the object;

(c) immobilisation of the object; and

(d) lease or, except where covered by sub-paragraphs (a) to (c), management of the object and the income therefrom."

[34] Article X of the Protocol to that Convention (which South Africa has, under its Declarations in respect of the Protocol, agreed to apply in its entirety) added article 13(1)(e) to the Convention in the following terms: [(e) if at any time the debtor and the creditor specifically agree, sale and application of proceeds therefrom]. It also states that "speedy" under article 13(1) means

[9] The Convention on International Interests in Mobile Equipment (signed on 16 November 2001) as supported by the Protocol to the Convention on International Interests in Mobile Equipment on matters specific to aircraft equipment (signed on 16 November 2001)

"within such number of working days from the date of filing of the application for relief as is specified in [South Africa's] declaration."

[35] South Africa's declaration states that the time period is no longer than 10 calendar days in relation to the remedies set forth in Articles 13(1)(a) -(c) and not longer than 30 calendar days in respect of the remedies in Articles 13(1)(d) and (e). South Africa has thus undertaken to have the matters which are the subject of this application heard and decided urgently and within a matter of days.

[36] The fact that the applicants have elected to defend the English proceedings and intend to counterclaim for the permanent redelivery of the Aircraft is no bar to the applicants seeking urgent interim relief in this Court for the redelivery of the Aircraft to the applicants pending the final determination of those proceedings.

[37] The Gupta respondents do not, in any event, allege that they are prejudiced by the attenuated timelines afforded to them by the applicants in defending this application. They were afforded seven court days to answer the present application. They filed their answering affidavit one day late and therefore utilised eight court days. They filed a full answering affidavit (71 pages excluding annexures) and do not seriously allege that they were prejudiced in their ability to do so. Moreover, the applicants had given them far more notice of these proceedings than was requested by Westdawn's English solicitors in the letter dated 5 February 2018, where they wrote:

"Should your client [EDC] or Stoneriver intend to take enforcement steps in respect of the Aircraft outside of the existing English proceedings, or otherwise take action to limit the movement of the Aircraft, such steps or action will be vigorously defended and our client [Westdawn] requires 5 business days' notice of your intention to do so, in order that appropriate steps can be taken and so that our client has an adequate opportunity to appear at any related hearing."

[38] For these reasons, I am satisfied that the applicants were justified in setting the matter down on an urgent basis as they will be unable to obtain substantial redress at a hearing in due course.

The question of this Court's jurisdiction

[39] The Gupta respondents do not submit to the jurisdiction of this Court. They contend that their entitlement not to do so arises from both the Facility and the Lease Agreements which accord exclusive jurisdiction to the Court of England and Wales.

[40] This contention is without foundation since section 21(1) of the Superior Courts Act 10 of 2013 provides that this Court has jurisdiction over "all persons residing or being in ... its area of jurisdiction." Westdawn is a company incorporated in South Africa. It has its registered office and its principal place of business in Sandton. This Court therefore has jurisdiction over it.

[41] Oakbay is likewise a company incorporated in South Africa. It has its registered office and its principal place of business in Sandton. This Court has

jurisdiction over it.[10] Mr Atul and Mrs Chetali Gupta reside in Saxonwold. This Court has jurisdiction over them.

[42] The Aircraft is registered in South Africa. The Lease Agreement requires the Aircraft to remain registered with the Aviation Authority of the State of Registration for the duration of the lease. The State of Registration under the lease agreement is the Republic of South Africa and the Aviation Authority is the fifth respondent in this application.

[43] For these reasons, this Court has jurisdiction in this application.

An order of this Court would be effective

[44] The Gupta respondents persist in the contention that that this Court is deprived of jurisdiction because any order it gives would be ineffective. This very contention was rejected by the SCA in *Metlika Trading Ltd v Commissioner, South African Revenue Service*[11] on almost identical facts. There the SCA was faced with the question of whether the Gauteng Provincial Division had jurisdiction to order a party to take steps to procure the return of an aircraft to South Africa. As in the present matter, the aircraft had been flown out of South Africa at the time the order was sought. The party ordered to return the aircraft argued that the court a *quo* had no jurisdiction to order that the aircraft be returned to South Africa firstly, because such an order infringed the sovereignty of the foreign country concerned and secondly, because the court a quo would be unable to give effect to its order.

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[10] See: *Bisonboard Ltd v Braun Woodworking Machinery (Pty) Ltd* 1991 1 SA 482 (A); *Mayne v Mayne* 2001 (2) SA 1239 (SCA) para 3

[11] *Metlika Trading Ltd v Commissioner, South African Revenue Service* 2005 (3) SA 1 (SCA).

[45] Streicher JA summarized the two opposing views on the point in contention as follows:

"Pollack accepts that Lenders reflects our law as regards foreign jurisdictions, i.e. that the mere fact that a respondent is an *incola* of the court is insufficient to confer jurisdiction on the court to make an order for delivery or movable property situate outside the Republic. *Forsyth, Private International Law 4th ed at 233*, on the other hand, is of the view that 'if the respondent is an incola, the court may assume jurisdiction to grant an interdict (whether mandatory or prohibitory) no matter if the act in question is to be performed or restrained outside the court's area'. He argues that if 'the respondent is an incola...the court will have control over him and will be in a position to ensure compliance with its order'."

[46] After considering the development of English case law and the judgment of *Hugo v Wessels*[12], Streicher JA held:

"In the light of the aforegoing, I agree with Forsyth's view that, if the respondent is an *incola*, the Court may assume jurisdiction to grant an interdict (whether mandatory or prohibitory) in *personam* no matter if the act in question is to be performed or restrained outside the Court's area of jurisdiction. The authority to the contrary is not persuasive and should, to the extent not consistent with this judgment, be considered to be overruled."

[47] Streicher JA noted that the Aircraft was registered in South Africa in the name of an *incola* company ("HAS") that was the operations manager of the aircraft and a partner in the new partnership that owned the aircraft. Having found that it was "clearly within the power of the new partnership and HAS to

[12] *Hugo v Wessels* 1987 (3) SA 837 (A) at 855J-856A

procure the return of the aircraft to the Republic," Streicher JA went on to hold that:

"...The order could be enforced by contempt of Court proceedings against the directors of HAS. The availability of that remedy, in the event of a failure by HAS to comply with the order, rendered the order sufficiently effective to confer jurisdiction on the Court a quo to grant the order. The order does not affect the sovereignty of a foreign court at all. It is an order in *personam* against respondents subject to the Court's jurisdiction and not against third parties. It will, if not complied with, be enforced in South Africa against the respondents concerned. ..."

[48] In the present case, Westdawn is an *incola* of this Court and the applicants seek an order directing Westdawn to deliver the Aircraft either to the United Kingdom or to South Africa. It is plainly in Westdawn's power to procure the return of the Aircraft as it is still in use and Westdawn has, since the termination notices were delivered, continued to fly it to various international destinations. If Westdawn does not comply with this Court's order, then the order could be enforced by contempt of Court proceedings against the directors of Westdawn.

[49] The applicants also seek a prohibitory interdict in respect of the Gupta respondents. Since the Gupta respondents are all *incolae* of this Court, contempt of court proceedings could be instituted if any of them fail to adhere to the order. Such proceedings could be launched against the directors of Westdawn and Oakbay and against Mr and Mrs Gupta personally.

[50] The Cape Town Agreement, specifically contemplates the grounding of the Aircraft in a foreign jurisdiction. As indicated earlier, South Africa and the

various countries to which the Aircraft has been flown in the previous months are all parties to the Cape Town Agreement.

Forum non conveniens

[51] The Gupta respondents urge this Court to decline to exercise jurisdiction as it is not the *forum conveniens*. The Court cannot do so as the doctrine of *forum conveniens* does not reflect our law. The SCA summarised the legal position in *Agri Wire:*[13]

"Save in admiralty matters, our law does not recognise the doctrine of forum non-conveniens, and our courts are not entitled to decline to hear cases properly brought before them in the exercise of their jurisdiction."

[52] This matter has been properly brought before this Court on the basis of the Gupta respondents' *domicilia*. This Court does not have the discretion to decline to exercise jurisdiction on the basis that the English court is alleged to be better suited to hear the matter.

The agreements do not exclude the jurisdiction of this Court

[53] The Gupta respondents persist in the argument that this Court has no jurisdiction to entertain this application for the further reason that both the Lease and Facility Agreements confer exclusive jurisdiction on the English Courts. I do not agree. On a plain reading, the Lease Agreement as well as the Facility Agreement do not exclude the jurisdiction of this Court. Clause 27.2 of the Lease Agreement provides:

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[13] *Agri Wire (Pty) Ltd v Commissioner, Competition Commission* 2013 (5) SA 484 (SCA) para 19. See also *Makhanya v University of Zululand* 2010 1 SA 62 (SCA) para 34.

"Subject to Clause 27.4 (Repossession), the courts of England and Wales shall have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including a dispute regarding the existence, validity or termination of this Agreement)." The Parties agree that the courts of London, England are the most appropriate and convenient courts to settle disputes and accordingly neither Party will argue to the contrary save that, as such agreement conferring jurisdiction is for the benefit of the Lessor only, the Lessor shall retain the right to bring proceedings against the Lessee in any court in another country."

[54] Clause 27.4 of the Lease Agreement in turn provides:

"Notwithstanding the provisions of Clauses 27.1 (Governing Law) and 27.2 (Jurisdiction) hereof, the governing Law and jurisdiction shall in the case of a repossession action by Lessor in accordance with Clause 20.4 (De-registration) hereof, be (at the exclusive choice of Lessor), any Law and competent court in which jurisdiction the Aircraft may be physically positioned and/or registered."

[55] Similarly, clause 37.1 of the Facility Agreement provides:

(a) "Subject to Clause 37.1(b), English courts have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including a dispute regarding the existence, validity or termination of this Agreement) (a "Dispute").

(b) The Parties agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary.

(c) This Clause 37.1 is for the benefit of the Finance Parties only. As a result no Finance Party shall be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by Law, the Finance Parties may take concurrent proceedings in any number of

jurisdictions."

[56] EDC and Stoneriver are clearly entitled, under the Facility and Lease Agreements respectively, to bring proceedings in any other court with jurisdiction. In any event, this Court would not be bound by a contractual provision that purported to exclude its jurisdiction. It is settled law that parties to a contract cannot exclude the jurisdiction of a court by agreement.[14] When faced with a clause purporting to oust a court's jurisdiction, the court may not decline to exercise jurisdiction. Although in such a case the court may exercise its discretion to stay proceedings pending the outcome of proceedings in a foreign jurisdiction, this Court has not been asked to do so in the present matter.

Jurisdiction under the Cape Town Convention

[57] This Court has jurisdiction for the further reason that the Facility Agreement recognises South Africa as a Contracting State to the Convention on International Interests in Mobile Equipment, as supplemented by the Protocol to the Convention on matters specific to aircraft equipment.

[58] Under Article 11 of the Convention, the debtor and creditor may agree in writing to the events that constitute a default and give rise to remedies specified in the Convention. When such an event of default has occurred, the lessor may seek a remedy under Article 10 and

"(a) subject to any declaration that may be made by a Contracting State under Article

[14] *Foize Africa (Pty) Ltd v Foize Beheer BV and Others* 2013 (3) SA 91 (SCA) para 21; *Omar v Inhouse Venue Technical Management (Pty) Ltd* 2015 (3) SA 146 (WCC) para 163.

54, terminate the agreement and take possession or control of any object which the agreement relates; or

(b) apply for a court order authorising or directing either of these acts."

[59] Article 13(1) sets out an extensive list of remedies which a court may grant on an interim basis. This includes an order vesting the possession, control, custody, or management of the Aircraft in the creditor or immobilising the Aircraft.

[60] Article 43 preserves jurisdiction for the purposes of article 13. Articles 43(1) and (2) state that the courts of the Contracting State chosen by the parties have jurisdiction to grant relief under Article 13(1).

[61] Article 43(3) states that a court has jurisdiction to provide interim relief under Article 43(1) or (2) irrespective of whether the final determination of the relief claimed in Article 13 (1) will take place in a court of another Contracting State.

[62] Under Article 43 of the Convention, the South African courts are therefore expressly recognised as having jurisdiction in this matter. South Africa is a Contracting State, and the South African courts are the applicants' chosen forum for these interim proceedings, as permitted by the Lease and Facility agreements. This Court therefore has jurisdiction to hear the matter and to grant the relief sought.

Interim Interdictory Relief

[63] The requirements for an interim interdict are well-known. First, there must be (at a minimum) a prima facie right on the part of an applicant.[15] Second, there must be a well-grounded apprehension of irreparable harm if interim relief is not granted. Third, the balance of convenience must favour the granting of interim relief. And lastly, there must be no other ordinary remedy that is available to give adequate redress to the applicant.[16]

[64] These factors are traded-off against one another. The stronger an applicant's prima facie right, the less the need to rely on prejudice to himself or herself. Conversely, the weaker the applicant's prospects of success, the greater the need for the other factors to favour him or her.

The right on which the applicants rely

[65] Clause 20.3 of the Lease Agreement provides for a series of cumulative remedies if an Event of Default has occurred and is continuing:

(a) Clause 20.3(a) provides that Stoneriver may accept such repudiation and terminate the leasing of the Aircraft (but without prejudice to the continuing obligations of Westdawn under the Lease Agreement).

(b) Clause 20.3(c) provides that Stoneriver may either take possession of the Aircraft or cause the Aircraft to be redelivered to Stoneriver at the Redelivery Location.

(c) Clause 20.3(d) provides that Stoneriver may by serving a notice require

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[15] *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189.
[16] *Eriksen Motors Ltd v Protea Motors* 1973(3) SA 85 (A) at 691F

Westdawn to redeliver the Aircraft to Stoneriver at the Redelivery Location.

(d) Clause 20.4 of the Lease Agreement provides that, if the leasing of the Aircraft is terminated under clause 20.3, Westdawn is required to take steps to deregister the Aircraft and redeliver it to Stoneriver.

[66] The effect of these provisions is that, if an event of default has occurred and is continuing, Westdawn is obliged to redeliver the Aircraft to Stoneriver. Once the leasing is terminated, there is no lawful basis for Westdawn to have possession of the Aircraft, and Stoneriver as the owner, is entitled to be placed back in possession of it. Stoneriver has exercised these rights: the December notice, the January notice and the February notice relied on clause 19 and clause 20.3 of the Lease Agreement and called on Westdawn to redeliver the Aircraft to Stoneriver.

[67] Stoneriver is the owner of the Aircraft. As the leasing has been lawfully terminated, Stoneriver is entitled to claim possession or redelivery of the Aircraft by virtue of its ownership.

[68] The Gupta respondents contend that the relief sought in the notice of motion cannot be granted since it involves an "inversion of the status quo" and they are "entitled to continue the enjoyment of the full spectrum of rights granted under the lease agreement". This contention is unfounded for three reasons. The first is that since the applicants have terminated the leasing of the Aircraft, the Gupta respondents have no right to continue using the Aircraft. The second is that interim relief is not always intended to preserve the status quo. If that were the case, it would not be competent for mandatory

interdicts to be granted on an interim basis. Our courts have not only granted mandatory interdicts on an interim basis, but have done so specifically in order to require the redelivery of assets *pendente lite*.

[69] In any event, the relief sought in the notice of motion is the very relief required by Article 13 of the Cape Town Convention, which obliges a Contracting State to provide "speedy relief" involving "preservation of the object" and "immobilisation of the object" pending final determination of a claim for default.

The applicants' right is established on the papers

[70] In order to establish the right which they seek to protect by interim interlocutory relief, the applicants must establish on at least a prima facie basis that an event of default had occurred, and was continuing when they gave notice to terminate the leasing of the Aircraft.

[71] It is clear from the definition of the term "event of default" read with clause 20.1 of the Lease Agreement, that any one of the events listed in clause 20.1 of the Lease Agreement would constitute an event of default. Moreover, clause 20.1 provides that Westdawn "acknowledges that the occurrence of any one of the foregoing Events of Default represents repudiation (but not termination) of this Agreement by Lessee". Thus contrary to what the Gupta respondents argue, materiality of the event of default is not a general requirement for an event of default.

[72] In establishing an event of default under the Lease Agreement, regard must be had also to the Facility Agreement and the Personal Guarantee. In terms of clause 20.1(p) of the Lease Agreement, one of the events of default listed is "the occurrence of a Loan Default". A "Loan Default" is defined as an event of default under the Facility Agreement. This means that an event of default under the Facility Agreement is also an event of default under the Loan Agreement.

[73] While the December, January and February notices rely on many events of default, it would suffice if the applicants are able to show on a prima facie basis that any one of those events of default has occurred. Since these are motion proceedings, the applicants must establish events of default that do not give rise to any significant factual disputes. As is clear from the description of the events of default listed below, they are essentially common cause.

Oakbay's failure to provide audited financial statements to EDC

[74] The first undisputed event of default raised by the applicants is that Oakbay's annual financial statements have not been provided to EDC. In terms of paragraph 1(a) of Schedule 10 to the Facility Agreement, Oakbay undertook to provide EDC with its audited financial statements within 270 days after the end of each financial year. As raised by the applicants in their February notice, Oakbay has not furnished EDC with its audited financial statements for the financial year ended 28 February 2017.This constitutes an event of default in terms of clause 20.3 of the Facility Agreement. It also

constitutes an event of default within the meaning of the Lease Agreement. Stoneriver has accepted the repudiation and has terminated the leasing of the Aircraft.

[75] The February notice was issued after the application had already been launched. It was therefore not referred to in the founding affidavit, but it was referred to in the replying affidavit. The Gupta respondents seek to strike this allegation from the replying affidavit as it was not raised in the December and January notices. This event had not yet eventuated at the time when the December and January notices were issued. The Gupta respondents could have filed a rejoinder affidavit if they disputed the factual allegations regarding the February notice. Since they did not do so, the applicants are entitled to rely on the contents of the February notice. The comment of Murphy J in *Tantoush v Refugee Appeal Board*[17] is apposite:

"As these averments were made in the replying affidavit the second respondent strictly speaking had no entitlement to respond to them and in the normal course they could not be denied or explained by the respondents. Nevertheless, if the allegations by Ms Peer were untrue, or if an adequate explanation were possible, leave of the court could and should have been sought to answer them .... The respondents did not request to be given an opportunity to deal with these averments. Their failure to do so tilts the probabilities towards the applicant's version"

[76] It follows that on this ground alone, an event of default has been clearly established.

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[17] *Tantoush v Refugee Appeal Board* 2008 (1) SA 232 (T) para 51.

Liens granted by Oakbay and Mr and Mrs Gupta

[77] It is common cause that Oakbay granted a lien over its assets in favour of the Bank of Baroda in 2011, and that Mr Atul and Mrs Chetali Gupta granted liens over their assets in 2008. These liens were not disclosed to the applicants when the Facility Agreement and the Lease Agreement were concluded. Notably, Clause 12 to Schedule 10 of the Facility Agreement provides:

"The Borrower and the Corporate Guarantor shall not, and the Borrower shall procure that the Personal Guarantors shall not, create or permit to subsist any lien over any of its assets, other than those liens created or permitted in accordance with the terms of the Transaction Documents and the "Transaction Documents" for the purposes of any Other Original Lender Transaction relating to the Companion Aircraft."

[78] The granting of liens over their assets was clearly a breach by Oakbay as corporate guarantor, and Mr and Mrs Gupta as personal guarantors, of their obligations under the Facility Agreement. This amounts to an event of default within the meaning of both the Facility Agreement and the Lease Agreement.

Atul Gupta ceased to be the chairman of Oakbay

[79] It is common cause that Mr Atul Gupta ceased to be the chairman of Oakbay before the repayment date of 16 October 2017, and that he was not the chairman of Oakbay when the December notice was issued. On each of the subsequent repayment dates, Oakbay represented and warranted that Mr Atul Gupta was the chairman of Oakbay. Since this was false and constituted a material adverse change, it amounted to an event of default within

the meaning of clause 20.5 of the Facility Agreement and 20.1(p) of the Lease Agreement.

Disposal of businesses by Oakbay

[80] The disposal of assets is a default event under Clause 20.15 of the Facility Agreement. It is common cause that in 2017 Oakbay commenced to dispose of its interests in Infinity Media and Tegeta. This constituted an event of default within the meaning of clause 20.15 of the Facility Agreement, since Oakbay disposed of a material part of its assets. It also constituted an event of default in terms of clause 20.3 of the Facility Agreement, since Oakbay breached its undertaking in Schedule 10 clause 15(c) not to "sell, lease, transfer or otherwise dispose of any of its assets". It follows that this too was an event of default within the meaning of the Lease Agreement.

Material adverse change

[81] The founding affidavit describes a series of events that had impacted on Westdawn's ability to perform its obligations under the Lease Agreement at the moment when the December notice was issued. They included the closure of Westdawn's bank accounts by all four of the major banks in South Africa; the delisting of Oakbay Resources from the Johannesburg Stock Exchange; and the resignation of two auditors of Oakbay. The answering affidavit admits that these events have occurred (although it disputes their legal characterisation).

[82] Each of these events undoubtedly constitute a material adverse

change, within the meaning of clauses 20.1(m) of the Lease Agreement. The occurrence of a material adverse change constitutes an event of default in terms of clause 20.1(q) of the Lease Agreement.[18]

The Eskom proceedings

[83] As indicated, the Eskom proceedings were launched in December 2017. An amount in excess of R7 billion has been claimed from Oakbay on the basis of corrupt conduct. On each of the repayment dates, Oakbay represented and warranted that no litigation was pending against it which, if adversely determined, would have a material adverse effect upon its financial condition.[19] This was false, and amounted to an event of default within the meaning of the Loan Agreement.[20]

The POCA proceedings

[84] As indicated, in January 2018 the Free State Division of the High Court (Bloemfontein) granted a preservation order in terms of POCA. The order preserved assets of Westdawn, Oakbay and Mr Atul Gupta.

[85] In their founding papers, the applicants relied on allegations in the POCA proceedings to the effect that corrupt payments had been made to Westdawn. In their answering affidavit, the Gupta respondents did not deal with these allegations other than to offer a bare denial. But this denial is inadequate since the facts lie within the knowledge of the Gupta respondents. The SCA explained the principle in *Wightman t/a JW Construction v*

[18] Clause 20.1(q) of the Lease Agreement.
[19] Clause 1(n) of the Facility Agreement.
[20] Clause 20.1(g) of the Lease Agreement.

Headfour (Pty) Ltd[21]:

"There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied.... There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

[86] On each of the repayment dates, Westdawn represented and warranted that no "Prohibited Payment" had been made to it or any of its affiliates, and that no person acting on its behalf had been held by a judgment of a court to have received a "Prohibited Payment". In light of the POCA proceedings, this was false and amounted to an event of default within the meaning of the Lease Agreement.

[87] In the Personal Guarantee, Mr Atul and Mrs Chetali Gupta warranted that "there is no fact or circumstance which has not been disclosed by the Guarantor to the Beneficiary in writing on or before the date of this Guarantee, and which materially adversely affects or will materially adversely affect the ability of the Guarantor to carry on his business or to perform his obligations under any Transaction Documents to which he is a party". The events referred to in the POCA proceedings show that this

[21] *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 3 SA 371 (SCA) para 13.

warranty was breached by Mr Atul Gupta and Mrs Chetali Gupta. This constituted an event of default under both the Facility Agreement and the Lease Agreement.

[88] The fact that the POCA preservation orders against the Gupta respondents were set aside on 9 March 2017 by the Free State Division of the High Court is immaterial because at the time of issue of the January 2018 notice, the warranty that no "Prohibited Payments" were made was false when regard is had to the allegations in the POCA proceedings. Moreover, at the time, the POCA preservation orders against the Gupta Respondents were valid and properly relied upon by the applicants in support of the urgent interim relief sought by them in this application.

[89] For the reasons set out above, I am satisfied that the applicants have established a strong prima facie right to the interim relief sought for the grounding and return of the Aircraft to the applicants.

[90] By virtue of the strength of the right on which the applicants rely, the other requirements for interim relief, namely irreparable harm, balance of convenience and no other effective remedy assume a subordinate role. I am, however, satisfied that the applicants have comfortably met the test for these requirements as well.

[91] In relation to irreparable harm, I have already found that the applicants will suffer irreparable harm if the applicants are not, pending the finalisation of the English proceedings, granted an interim interdict for the grounding, return

and storage of the Aircraft.

[92] As to the balance of convenience, little, if any, harm will be caused to the Gupta respondents if interim relief were to be granted and if the applicants were to be unsuccessful in the English proceedings. Although the Gupta respondents will not be able to use the Aircraft during the interim period, they will also not have to pay rental to Stoneriver.[22] The savings from the non-payment of the rental for leasing the Aircraft could be used toward buying first-class tickets on scheduled airlines or to charter another aircraft for the Gupta respondents. This can hardly be an inconvenience.

[93] Markedly, EDC has tendered to compensate Westdawn for proven and actionable loss suffered by it if interim relief were to be granted and if final relief were to be refused in the English proceedings. The Gupta respondents have rejected the tender.

No other remedy

[94] In relation to the last requirement, the applicants have demonstrated that there is no other satisfactory remedy. The suggestion by the Gupta Respondents that the applicants' alternative remedy is to allow Westdawn to exercise the Call Option is singularly unhelpful as this is no remedy at all, primarily because the Aircraft can only be purchased in terms of the Call Option if "no Event of Default is continuing". That is not the case here, since multiple Events of Default were continuing when the Call Option was purportedly exercised.

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[22] *Tshwane City v Afriforum* 2016 (6) SA 279 (CC) paras 59 and 63.

[95] I am accordingly satisfied that the applicants have succeeded in making out a case for interim interdictory relief that is directed at grounding, returning and storing the Aircraft in a safe location pending the final determination of the English proceedings.

Order

[96] In the result, I make the following order:

1. this application is enrolled as an urgent application and, insofar as may be necessary, the forms prescribed by the rules of this Honourable Court are dispensed with, that this application be heard as one of urgency under Rule 6(12);

2. pending the final determination of the matter between the first respondent and the applicants in the High Court of Justice (England and Wales) under Claim Number BL-2017-000612 ("the interim period"), ordering that

    2.1. within fifteen calendar days of the date of this order, the first respondent shall deliver the *Bombadier Global 6000* with Serial No 9631 and Registration Mark ZS-OAK ("the Aircraft"), together with appliances, components, parts, instruments, appurtenances, accessories, furnishings, seats, and other equipment and additions of wherever nature, into the first applicant's, alternatively, second applicant's, further alternatively, the first and second applicants' custody at Lansaria International Airport, Johannesburg, South Africa, together with the documentation in Annexure "NM1";

2.2. the first to fourth respondents are interdicted and restrained from possessing, disposing of or using the Aircraft except for the purposes of implementing the order in 2.1 above;

2.3. the first applicant, alternatively, the second applicant, further alternatively, the first and second applicants, shall store and maintain the Aircraft during the interim period, but the Aircraft may not be used, sold or disposed of by the applicants without the approval of a court of competent jurisdiction.

3. In the event that any of the first to fourth respondents fail to comply with any parts of the orders in 1 and 2 above, and without prejudice to any other enforcement (contempt of court or other proceedings which the applicants may wish to institute), ordering that –

3.1. within three days of receiving notification in writing from the applicants of the fact that the relevant order of this Court has not been timeously complied with together with a written request by the applicants that the Aircraft registration be cancelled, the fifth respondent is to cancel the Aircraft's registration with immediate effect for the duration of the interim period; and

3.2. the fifth respondent is to deliver to the applicants a certificate of cancellation evidencing the cancellation of registration of the Aircraft within five days of cancelling the registration.

4. The first to the fourth respondents are ordered to pay the costs of this application, including the costs of two counsel.

KATHREE-SETILOANE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION,
JOHANNESBURG

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Date of Hearing: 9 March 2018

Date of Judgment: 19 March 2018