

**CASE NO : 175/2002**

**IN THE HIGH COURT OF SOUTH AFRICA  
(BOPHUTHATSWANAPROVINCIAL DIVISION)**

**In the matter between:**

**MAREE DU PLESSIS**

**APPLICANT**

**and**

**MARIAN TODD NO**

**1<sup>ST</sup> RESPONDENT**

**CHRISTOFF ERASMUS JOOSTE**

**2<sup>ND</sup> RESPONDENT**

**THE MASTER OF THE HIGH COURT**

**3<sup>RD</sup> RESPONDENT**

**In Re:**

**CHRISTOFF ERASMUS JOOSTE**

**APPLICANT**

**and**

**THE MASTER OF THE HIGH COURT**

**1<sup>ST</sup> RESPONDENT**

**MAREE DU PLESSIS**

**2<sup>ND</sup> RESPONDENT**

**MARIAN TODD**

**3<sup>RD</sup> RESPONDENT**

**MMABATHO**

**DATE OF HEARING: 22 AUGUST 2002**

**DATE OF JUDGMENT : 5 DECEMBER 2002**

**FOR THE APPLICANT: ADV D F BLIGNAUT**

**FOR THE RESPONDENT : ADV L H J PISTOR**

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# J U D G M E N T

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## LEEUWJ:

1. On the 22<sup>nd</sup> August 2002, I dismissed this Application with costs and what follows are the reasons therefor.

### 2. Introduction:

The Applicant, Mr Du Plessis, brought a Counter Application against the First and Second Respondents for an order in the following terms:

- “1 ‘n Verklarende bevel dat daar op 29 Oktober 2001 ‘n koopkontrak tussen die Applikant en HENDRIK NICOLAAS DU PLESSIS WISSING in sy hoedanigheid as gevolgtogte van die Eerste Respondent tot stand gekom het waardeur die Applikant die Cessna Cardinal vliegtuig met registrasienommer ZS-IIZ van die boedel van wyle DENNIS TODD gekoop het vir ‘n koopprijs van R132 000-00.
- 2 Dat die Eerste Respondent gelas word om alle stappe wat noodsaaklik is te neem om oordrag van die eiendomsreg van die voormelde vliegtuig aan die Applikant te bewerkstellig teen betaling van die koopprijs van R132 000-00.
- 3 Dat indien die Eerste Respondent versuim om binne 14 (veertien) dae na datum van hierdie bevel die voormelde noodsaaklike stappe te neem, die Balju vir die Hooggeregshof vir die distrik Pretoria-Oos gemagtig word om sodanige stappe namens die Eerste Respondent te neem.
4. Dat die boedel van wyle DENNIS TODD gelas word om die koste van die aansoek te betaal alternatiewelik dat die Eerste en Tweede Respondente gelas word om die koste van die aansoek te betaal, slegs in geval van opposisie.

5. Verdere en/of alternatiewe regshulp.”

3. **Background Information**

The First Respondent, (“Mrs Todd”), has been cited in her capacity as the executrix of the deceased estate of her late husband, Dennis Todd; it is alleged by the Applicant that he concluded a contract of sale with Mrs Todd on the 29<sup>th</sup> October 2001, wherein she agreed to sell the Cessna Cardinal Aircraft, registration number ZS IIZ (“the aeroplane”) to him, for which he had made a written offer of R132 000-00 and which offer was accepted on the 29<sup>th</sup> October 2001 by the First Respondent’s Attorney, Mr Wissing, acting on her instructions.

4. The Second Respondent, (“Mr Jooste”), was joined in the Application by virtue of the fact that Mrs Todd, who had repudiated her offer to sell the airplane to the Applicant, decided instead, to sell it to (Mr Jooste) who, alleges that he was granted a first option to purchase the plane during August 2001 by Mrs Todd.

5. The Master of this Honourable Court, the Third Respondent, (“the Master”) had made a ruling in writing on the 30<sup>th</sup> November 2001 to the effect that the agreement between Mrs Todd and the Applicant was a valid and binding contract of sale. Mr Jooste was the Applicant in this matter and the Master, Mr Du Plessis (“the Applicant”) and Mrs Todd were Respondents.

This decision was reviewed and set aside by this Honourable Court on the 23<sup>rd</sup> May 2002.

6. It is against this background that the Applicant approached this Court by means of a Counter Application for the purpose of resolving the dispute pertaining to the airplane.

The Counter Application against Mrs Todd and Mr Jooste was served on the attorneys who acted for them in the Main Application on the 28<sup>th</sup> May 2002, a few days after finalization of the Main Application. The Counter Application is opposed by Mr Jooste only.

7. **Point in limine**

The following points in limine were taken by Mr Jooste:

- (i) The Applicant's founding affidavit, clearly discloses that there is a dispute of fact and therefore the Applicant ought to have approached this Honourable Court by means of action proceedings;
- (ii) that this Honourable Court has no jurisdiction to adjudicate over this matter; and
- (iii) that the Applicant should have joined the other heirs of the late Mr Dennis Todd's estate as Respondents, who are parties to the Redistribution Agreement and who, according to one of the terms of the Redistribution Agreement, were to be consulted before any estate property could be alienated to third parties; that they are therefore interested and necessary parties to this application.

## **8.Submission by Counsels:**

In addition to the abovementioned points, Mr Pistor on behalf of the Second Respondent, Mr Jooste, added that Mrs Todd was cited in her capacity as an executrix of the estate of the late Mr Dennis Todd, whereas she is also an heir to the estate. She ought to have been cited in her personal capacity because she has a direct and vested interest in the proceedings.

9.He further submitted that it was irregular for the Applicant to bring a Counter Application to an application for review, because this counterclaim was not filed simultaneously with the answering affidavit in the Main Application and also that there is no provision in the Rules of Court for a Counter Application in Rule 53 Review proceedings.

10.Mr Blignaut, on behalf of the Applicant submits, *inter alia*

- (i) on jurisdiction, that this Honourable Court has jurisdiction by virtue of the fact that the deceased's estate was reported to the Master of this Honourable Court in Mmabatho, and that
- (ii) In respect of the letter written by the attorney, Mr Wissing, on behalf of Mrs Todd, wherein he was given full power of attorney to finalize the contract of sale between Mrs Todd and Plaintiff, Mr Blignaut submits that a binding contract was concluded and therefore no dispute of fact exist.

## **ANALYSIS OF ISSUES AND THE LAW**

### **11. Jurisdiction:**

11.1 Neither the Applicant nor Mr Jooste and Mrs Todd, are resident within the area of jurisdiction of this Honourable Court; There is therefore no nexus between the parties and the area of jurisdiction of this Court.

11.2 This Court is requested to determine the title to and to order the delivery of the Cessna Cardinal Aircraft, which movable property is situated in Gaborone, Botswana, outside the Republic of South Africa.

11.3 One of the prayers in the Notice of Motion is for an order directing the Sheriff of the High Court for the district of Pretoria East to execute the Court's order, despite the fact that the Deputy Sheriff of the Republic of South Africa does not have the right to enter the Country of Botswana for the purpose of executing such an order.

11.4 There is nothing in the Applicant's Founding Affidavit establishing jurisdiction to this court and neither could Mr Blignaut, on behalf of the Applicant, persuade me that such grounds have been established.

11.5 The position is clearly spelled out in the case of *Makoti v Brodie and Others* 1988 (2) SA 589 (BGD) at 576 by Waddington J of this Honourable Court:

“ The principle of effectiveness means that a Judge has no right to pronounce a judgment if he cannot enforce it within his own territory.” Compare *Veneta Mineraria Spa v Carolina Colliers (Pty) Ltd* in (In Liquidation) 1987 (4) SA 883 (A) at 893 E.

## **12. Is Jurisdiction established by virtue of the Counter Application?**

12.1 Rule 6 (7) (a) provides that:

“ Any party to any application proceedings may bring a counter-application or may join any party to the same extent as would be competent if the party wishing to bring such counter-application or join such party were a defendant in an action and other parties to the application were parties to such action. In the latter event rule 10 shall apply *mutatis mutandis*.” This rule seems to be applicable only where there is an action pending between both the Applicant in re-convention and the Respondents in convention.

12.2 Provision is made in action proceedings for a party to counterclaim against the Plaintiff’s action but such counterclaim must be delivered with the Plea. Delivery is made possible at a later stage if the consent of the Plaintiff in convention is obtained or with the leave of the Court. See Rule 24 (1).

12.3 The Main Application, which was brought against the Master of this Honourable Court, conferred jurisdiction to this Court over Mrs Todd and Mr Du Plessis as Respondents who were joined as parties affected by the dispute and whose rights would have been affected by the outcome of the judgment. This Court, if it were not for the Master, would have had no jurisdiction over the persons of the Respondents in re-convention (i.e. Mr Jooste and Mrs Todd). This was jurisdiction specially conferred.

12.4 This, therefore, does not confer jurisdiction to this Court in a Counterclaim/Counter-application falling outside the scope of this Court’s area of jurisdiction. The following remarks by

Wessels J (as he then was) in the case of Pretoria Municipality v. Andrew Goad 1911 TPD 672 at 682, with reference to Voet in my opinion, correctly reflect the law:

“He points out that if a judge has been given a special jurisdiction no counterclaim can be advanced which is outside that jurisdiction; as for example, if a person is cited before a special judge who deals with feudal matters concerning some feudal dispute, he cannot file a claim in re-convention belonging to the ordinary jurisdiction of the judge.”

12.5 The Main Application, to which the Applicant in this matter has brought a counter-application, was in terms of Rule 53. The order sought was to have the decision of the Master of this Honourable Court, pertaining to the disputed airplane, reviewed and set aside. Rule 53, unlike Rules 6 (7) (a) and 24 (1) aforementioned, does not make provision for a Respondent to counterclaim or to bring a counter-application.

12.6 Rule 4(1)(aA) provides that “where the person to be served with any document initiating application proceedings is already represented by an attorney of record, such document may be served upon such attorney by the party initiating such proceedings.”

I must pause here to state that Rule 4 (1) (aA) can be possible if the counter-application is filed together with the answering affidavit by the Respondent, same as in action proceedings. Compare Rule 24 (1) *supra*

12.7 In the Main Application, the decision of the Master of this Honourable Court was reviewed and set aside by this Court on



22 May 2002. It would appear from the Court Order, that the application was not opposed by the Respondents viz. The Master, Mr Du Plessis and Mrs Todd, in her personal capacity.

12.8 The Applicant's counter-application was filed with the Registrar on 7 June 2002 with Mrs Todd cited as the First Respondent and in her capacity as executrix of the late Mr Dennis Todd. Mr Jooste and the Master are Second and Third Respondents respectively. The application, together with the Notice of Motion, were served on the attorneys Andre Mulligan, who were attorneys of record having represented the First and Second Respondents. ("Attorneys for Applicant and Third Respondent in the Main Application").

12.9 This was an assumption on the part of the Applicant, Mr Du Plessis, because at the hearing of this application, there was neither an appearance for Mrs Todd nor indication as to whether she was properly served with the Application, especially taking into account the fact that the counter-application was issued almost fourteen (14) days after the Main Application was finalized.

### **13 On Non-Joinder**

13.1 Mrs Todd, as the First Respondent, has been cited in her capacity as the executrix of the estate of late Dennis Todd. The Applicant alleges that Mrs Todd was appointed executrix by the Master of this Honourable Court.

13.2 A Redistribution Agreement, filed with the pleadings as Annexure "CJ2", and made an Order of the High Court of Botswana on the 11<sup>th</sup> May 2001, provides

in Clause 9.2 thereof that:

“Any party wishing to transfer any of the said assets to a third party, in any manner whatsoever, who is not a descendant of the later (sic) Dennis Todd, must first offer same to the remaining parties on terms equal to the proposal from the third party. However, any sale of any assets of this Estate or which had previously belonged to the late Dennis Todd prior to the conclusion of this agreement shall not be challenged.”

13.3 According to the Applicant a valid contract of sale was concluded between him and Mrs Todd on 29 October 2001. This fact is denied by the Second Respondent, Mr Jooste, and he refers to his founding affidavit in the Main Application wherein he alleges that he was given a first option to purchase the said airplane which was accepted by Mrs Todd. He further alleges that he paid an amount of R13 800-00 as deposit towards the purchase of the airplane. The Respondent further raises the issue of non-joinder of other heirs to the estate in accordance with the Redistribution Agreement.

13.4 It is clear from the pleadings, that when the Applicant brought this application to this court, he was aware of the pleadings filed in the Main Application, because he was the Second Respondent. He was also aware of the terms and provisions of the Redistribution Agreement, which formed part of the Annexures in that application.

#### **14 On Dispute of Fact**

14.1 In paragraph 6 of the Applicant's Founding Affidavit, he makes the following

statement:

“Dit is my beskeie mening dat die reghulp was deur Mnr JOOSTE as Applikant in the Hoofaansoek aangevra word, nie die dispuut ten aansien van die Cessna Cardinal Vliegtuig met registrasienommer ZS-11Z (“die vliegtuig”) wat daar tans tussen myself, Mnr JOOSTE en Mev TODD bestaan sal oplos of bereg nie om daardie rede ag ek dit noodsaaklik en word ek geadviseer om hierdie aansoek aan die Agbare Hof te rig ten einde die Agbare Hof in ‘n posisie te plaas om die voormelde dispuut tussen die partye te besleg.”  
(sic)

14.2 The dispute with regard to the validity of the contract between Mrs Todd, the Applicant and the Second Respondent, formed the crux of applicant’s case in the decision of the Master, Annexure “CJ7”, which was subsequently set aside by this Honourable Court on the 23<sup>rd</sup> May 2002.

14.3 The following issues clearly indicate a dispute of fact in the Main Application:

- (a) The correspondence exchanged between the Applicant’s Attorney and Mr Jooste’s (the Second Respondent’s) Attorney show that there is a dispute with regard to the validity of the contracts, that is the contract of sale between Mrs Todd and the Applicant on the one hand and Mrs Todd and Mr Jooste, the Second Respondent;
- (b) That Mrs Todd, being a signatory to the Redistribution Agreement, was an heir together with the other beneficiaries of the estate of the late Mr Todd, and therefore ought to have been cited in her personal capacity and the other heirs joined as parties who have a direct and substantial interest in the outcome of the application;

- (c) The competence of Mr Wissing, an attorney, to enter into a contract on behalf of Mrs Todd, and the validity of the contract were challenged by Mrs Todd and Mr Jooste.
- (d) The affidavit of Mrs Todd, who was not adequately informed about this application and is as a result not before Court, is lacking. An explanation for her conduct regarding the dispute to the airplane would properly be dealt with in oral evidence, that is if this matter was brought to Court by action proceedings.

15. In summary, the Second Respondent succeeded on the following points raised *in limine*:

- (a) This Honourable Court has no jurisdiction to adjudicate over this application because:
  - (i) The parties to this application are not resident within the Court's area of jurisdiction;
  - (ii) The merx at issue is in a foreign Country, Botswana; therefore this Court is not competent to grant the order in prayers 2 and 3 of the Notice of Motion because such order would not be effective in Botswana.
- (b) This Honourable Court cannot grant the order in prayer 1 of the Notice of Motion because of the following:
  - (i) Mrs Todd, who is cited as the First Respondent, was

not properly served with this application and therefore not before Court either in her personal capacity or in her capacity as executrix of the estate of the late Dennis Todd, her husband;

- (ii) The non-joinder of the other heirs to the estate of the late Dennis Todd, who are necessary parties in accordance with the Redistribution Agreement, makes the proceedings defective; and
  - (iii) The dispute of fact with regard to the capacity of Mr Wissing to enter into a contract with Mr Jooste on Mrs Todd's behalf, and the dispute of fact arising out of the oral and written correspondence between the parties hereto, cannot be resolved on the papers filed before me.
- (c) The application was dismissed with costs because the Applicant should have realized, when he launched the application, that there is a serious dispute of fact which was incapable of being resolved on the papers filed. Secondly, the Applicant did not state the facts, in his founding affidavit, indicating or establishing jurisdiction of this Honourable Court. See Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1153 (T) at 1162.

## **Conclusion**

It is for the above reasons that the Second Respondent succeeded on the points in limine raised.

**M M LEEUW**

**JUDGE OF THE HIGH COURT**

**APPLICANT'S ATTORNEYS**

**: SMIT, STANTON**

**INC**

**2<sup>ND</sup> RESPONDENT'S ATTORNEY**

**: ANDRE MULLIGAN**