IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISON, PRETORIA)

CASE NO.: 79946/2019

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

_12 AUGUST 2020_____ _____
DATE SIGNATURE

In the matter between:

GRADCO SOUTH AFRICA (PTY) LTD APPLICANT
REG NO. 1999/026872/07

and

DAVID MOUTON FIRST RESPONDENT
Identity number: [….]

STARLITE AVIATION TRANING ACADEMCY
(PTY) LTD REG NO: 2006/015328/07 SECOND RESPONDENT

JUDGEMENT

SARDIWALLA J:

[1] This is an urgent application in terms of the provisions of Rule 6(12) (a) of the Uniform Rules of Court resulting from a refusal by the respondents to deliver or return the McDonnel Douglas 520N helicopter with registration letters ZT-RFL to the applicant. The applicant seeks to order the return of the helicopter.

[2] The applicant, Gradco South Africa (Pty) Ltd is a private company with limited liability duly registered and incorporated in terms of the Company laws of South Africa with its registered address at 27 Seinheuwel Street, Aerorand, Middleburg, Mpumalanga. The applicant is also the lawful owner of the McDonnel Douglas 520N helicopter.

[3] The first respondent, facilitated the oral lease agreement of the helicopter between the applicant and the second respondent. The second respondent conducts helicopter training for which it required the helicopter.

Background to the Application:

[4] In January 2019, the first respondent and the applicant entered into an oral lease agreement that the second respondent would lease the applicant's helicopter at the price of R 815 000.00 for 100 flights hours commencing 8 January 2019 for a period of 30days. During this period the second respondent would be liable for insurance of the helicopter.

[5] It was agreed that the first respondent would collect the helicopter at the

commencement of the lease period and return it upon its expiration to the Wonderboom Airport, in Pretoria. The first respondent was informed by the second respondent shortly before the expiration of the lease agreement that the helicopter had suffered damages and that it would be repaired by the Authorised Maintenance Organization ("AMO") at the Wonderboom Airport together with the second respondent at its maintenance facility in Johannesburg. The first respondent duly informed the applicant of the damages and it requested that the helicopter be returned. The first respondent advised the second respondent that the applicant required the return of the helicopter. At this stage the oral lease agreement period had expired and the second respondent was to return the helicopter to the applicant.

[6] The second respondent informed the first respondent that it would repair the helicopter on condition that it was able to retain possession of the helicopter until the remaining 40 flights hours were complete. The applicant however preferred to have the helicopter properly repaired by the AMO as it was of the view that the second respondent having already recklessly caused damage to the helicopter while in its possession was not capable of maintaining and operating the helicopter properly.

[7] Numerous meeting were held to discuss the repair of the helicopter which the second respondent refused to attend and has failed to return the helicopter.

[8] The first respondent visited the Wonderboom Airport in November 2019 to inspect the helicopter.

Applicant's Argument

[9] The applicant submits that the helicopter is the only model of its kind in the country and should it not be able to vindicate the helicopter now it could suffer irreparable harm. It submits that the respondents have to date failed to inform the applicant of the exact extent of the damages and whether they have access to the required experts to repair the helicopter. Therefore, the respondent's failure to communicate with the applicant and or return the helicopter the applicant is forced to approach this court for the requisite urgent relief and that should the Court not grant the relief it is likely that the damage to the vehicle may be irreparable.

[10] It further submits that as the lawful owner of the helicopter it is legally entitled to vindicate its property. That the respondent has failed to establish the existence of any legal right to retain possession of the helicopter. Lastly that this Court has jurisdiction as the cause of action arose within its jurisdiction.

First Respondent's Argument

[11] It is significant to note that the first respondent does not oppose the relief sought in this application. It sets out the factual background giving rises to the applicant claim and agrees that the applicant is the rightful owner of the helicopter. It further confirms the events as alleged by the applicant and states that it does not understand why the second respondent is refusing to return the helicopter to the applicant after numerous attempts to discuss the issue. The first respondent is of the professional opinion that

should the second respondent retain possession of the helicopter or attempt to fly or repair it that it would pose a threat to the general public and cause further loss and damages for the applicant.

The Second Respondent's argument

[12] The second respondent submits that this Court lacks jurisdiction as the helicopter is being held at its hangar in Mossel Bay in the Western Cape. Further that all the parties to this application do not reside within the jurisdiction of this Court which is a prerequisite for a court to have jurisdiction.

[13] The second respondent attacks the applicant's claim of urgency stating that the helicopter has no engine and as such cannot be flown therefore there will be no further deterioration of the helicopter and the applicant can therefore proceed obtain redress on the ordinary course of action. It further alleges that it has an improvement *lien* over the helicopter arising from the fact that the applicant's helicopter is stored at the second respondents' hangar and has been safeguarded and preserved by the second respondent at the cost of the second respondent. Further that it was not aware of the request from the applicant or the first respondent for the release of the helicopter until the receipt of the urgent application. In any event it is entitled to retain the helicopter as the applicant would be unjustifiably enriched by its return.

Jurisdiction

[14] In the determining whether this court has this jurisdiction, the investigation must start with the provisions of section 21 of the Superior Courts Act 10 of 2013:

> **'*Persons over whom and matters in relation to which Divisions have jurisdiction***
>
> *(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance…'*

[15] This, however, is has been stated that this is not necessarily determinative as noted in *Erasmus: Superior Court Practice*:

> *'The position under this section materially corresponds with the position under s 19(1) of the Supreme Court Act 59 of 1959 prior to the repeal of that Act on the commencement of the Superior Courts Act 10 of 2013 on 23 August 2013. As was the case with s 19 of the now repealed Supreme Court Act 59 of 1959, this section does not contain a 'codification' of the jurisdiction of the High Court. In fact, it has been said that s 19 was deliberately couched in 'indefinite wording' because the intention of the legislature obviously was to interfere with the common law as little as possible. It is submitted that this also applies to s 21 of the Act.'*[1]

[1] *Erasmus* at RS 6, 2018, A2-88.

[16] In ***Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd*** [2], the Court was called upon to determine whether consent alone was sufficient to confer jurisdiction on the High Court which was faced with two peregrini: a local Defendant and a foreign Plaintiff. In the course of this judgment, the Appellate Division remarked on the traditional reasons and grounds upon which jurisdiction is established:

> *'Insofar as South African Courts are concerned, their jurisdiction is the right or authority of entertaining actions or other legal proceedings which is vested in them by the State.*[3]
>
> …
>
> *In view of the indefinite wording of s 19(1) of the Act and its predecessors, no doubt deliberately so couched because the intention of the Legislature obviously was to interfere with the common law as little as possible, recourse must be had to the principles of the common law to ascertain what competency each of the Supreme Courts in the Republic of South Africa possesses to adjudicate effectively and pronounce upon a matter brought before and heard by it.*[4]
>
> …
>
> *A Court can only be said to have jurisdiction in a matter if it has the power not only of taking cognisance of the suit but also of giving effect to its judgment.'*[5]

[2] 1987 (4) SA 883 (A).
[3] *Veneta Mineraria Spa* at 886E.
[4] *Ibid* at 886I.
[5] *Ibid* at 893E.

[17] The Court, at 890E, quoted *Brooks v Maquassi Halls Ltd* 1914 CPD 371, where Kotzé J said at 376-7:

> *''According to our common law and practice under it, the Court will exercise jurisdiction upon any one of the following grounds, viz: (1) ratione domicilii; (2) ratione rei sitae; (3) ratione contractus; that is, where the contract has either been entered into or has to be executed within the jurisdiction.''*

[18] In ***Gallo Africa Ltd v Sting Music (Pty) Ltd***[6], the Supreme Court of Appeal was ceased with a case concerning an *incola* defendant facing a copyright infringement claim arising in South Africa and in 19 other countries. The Court discussed jurisdiction generally, noting that:

> *'Section 19(1)(a) of the Supreme Court Act provides that a High Court has jurisdiction "over all persons residing or being in and in relation to all causes arising . . . within its area of jurisdiction and all other matters of which it may according to law take cognizance". The section has a long history, which need not be related. However, our courts have for more than a century interpreted it to mean no more than that the jurisdiction of High Courts is to be found in the common law. For purposes of effectiveness the Defendant must be or reside within the area of jurisdiction of the court (or else some form of arrest to found or confirm jurisdiction must take place). Although*

[6] 2010 (6) SA 329 (SCA).

effectiveness "lies at the root of jurisdiction" and is the rationale for jurisdiction, "it is not necessarily the criterion for its existence". What is further required is a ratio jurisdictionis. The ratio, in turn, may, for instance, be domicile, contract, delict and, relevant for present purposes, ratione rei sitae. It depends on the nature of the right or claim whether the one ground or the other provides a ground for jurisdiction. Domicile on its own, for instance, may not be enough. As Forsyth (at 164) rightly said:

"First there is the search for the appropriate ratio jurisdictionis; and then the court asks whether it can give an effective judgment . . . . [and] neither of these is sufficient for jurisdiction, but both are necessary for jurisdiction."'[7]

[19] In this particular case, there was a contractual relationship that came into existence between the applicant and the respondents within in this Court's area of jurisdiction. In terms of this contractual relationship, the first respondent was to collect and deliver the helicopter to the Wonderboom Airport, Pretoria based on an agreement that was concluded between them, which agreement was entered into within the area of jurisdiction of this court. The first respondent confirms this in his answering affidavit and even indicated that he inspected the helicopter to ascertain the damages to the aircraft on 8 November 2019 giving a detailed account of the damages to the aircraft. The second respondent's averment that the aircraft has been stationed in Mossel Bay since the damage to the rotor blade is disputed and apart from the elected *domicilium* for the services of notices as their basis for this Court's lack of jurisdiction, it has

[7] *Gallo Africa Ltd* (supra) at para 10.

provided no other evidence to substantiate its claim that the aircraft is indeed in Mossel bay as it alleges. I am therefore inclined to believe the version of the applicant and the first respondent in this regard. Further that, although residence is the first port of call to determine jurisdiction, it is not the only determining factor. The applicant relies on the ground of *ratio contractu* which the Courts have found is a sufficient ground to establish jurisdiction. I am therefore satisfied that the contract having been entered into within this Court's jurisdiction that this Court can entertain the claim.

[20] The only issue left to be determined is whether or not the second respondent has a right to retain possession of the aircraft. To this end the respondent has relied on the defence of an improvement lien on the grounds that the second respondent hangered, Safeguarded and preserved the helicopter since February 2019.

[21] It has been clearly stated that a lien for storage is not maintainable at our law. In *Trust Bank van Afrika Bpk v van der Walt N.O.*[8] the court determined the claim of lien for storage charges as follows (translated version):

> *"There is no agreement to pay storage. Storage can, therefore, not be claimed ex contractu. If it is claimable it must be on the ground of enrichment. The applicant is not enriched by the storage of the lorry. Respondent had a claim against the applicant for the repair of the lorry and he held the lorry as security for the payment of those repairs. After completion of the repairs the respondent could immediately have claimed the amount due from applicant and if applicant failed to pay, the respondent could have sued him for the amount due. The debtor is not enriched by costs incurred by the creditor as a result of his omission to*

[8] 1972 (3) SA 166 (C)

claim, just as interest on an outstanding amount of money cannot be claimed. Storage cannot be claimed in these circumstances. If respondent foresaw storage as a result of late payment he should have stipulated for that." (at 170F-H)

[22] In a Full Bench decision in *Wessels v Morice*[9] the court stated, in part:

"But, after the permit had been obtained, and the cattle could have been returned it appears to us that, though quite within his rights in refusing to part with them until his expenses were paid, holding as he did on account of the owner who had asked for their return, the plaintiff, in these circumstances, was debarred from making any further charge for keeping the cattle merely to enforce his lien (see Somes v. British Empire Shipping Co., 8 H.L.C., 338). In the case cited the question was whether a person, who having a lien upon a chattel, chose to keep it for the purpose of enforcing his lien, could make any claim against the proprietor for so keeping it. The House of Lords was decidedly of opinion that he could not, and on principle we take the same view." (at 117)

[23] The court, in another Full Bench decision, confirmed *Wessels, supra*, on the principle that "no person has by law a right to add to his lien upon a chattel a charge for keeping it until the debt is paid."[10] In *Harrison N.O. v. McClelland*[11] the Full bench confirmed following was said:

"The other item is a sum of £8 17s. 6d. for garaging the car. When and where the respondent garaged the car, does not appear. She made no claim for it in

[9] 1913 NPD 112
[10] *Longpan Salt Co Ltd v Blumenfeld* 1922 177, at 181
[11] 1955 (3) SA 20 (D)

her statement of 27th October. So far as appears (and the applicant in her replying affidavit avers), this sum was incurred for garaging the car subsequent to the applicant claiming possession of it and during the time when the respondent was retaining possession of it in the exercise of the lien she claimed. If this is so, my view is that she is not entitled to present a claim for the cost of garaging incurred, in effect, in her own interests in order to retain possession in the exercise of her lien." (at 24A)

[24] I can find no agreement between the applicant and the respondents, express or tacit, that the second respondent would be entitled to retain possession of the aircraft in the event that the aircraft sustained any damages during the duration of the contract which as a result the aircraft would not be able to complete its scheduled 100 hours of flight. In fact, the written agreement albeit not signed by either party, but to which I will refer at paragraph 2.3 of the agreement it was agreed explicitly that the lessor would remain liable for all costs related to maintenance and snags of the helicopter. Further that in any event the storage lien the second respondent is alleging it possesses by its own averment occurred only after the expiration of the lease agreement, such agreement being that the respondents are to return the aircraft to Wonderboom Airport, Pretoria upon the expiration. From the authorities cited above It is clear that the second respondent is not entitled to claim any of the alleged amounts *ex contractu,* and although he could claim on the basis of undue enrichment, the courts have found that an applicant can never be enriched by a creditor who failed to claim. It is significant to also note that the second respondent alleges that it was unaware of the applicants request to have the aircraft returned for the repairs until the filing of this application. Given the many months that had passed before this application was

launched, I am reluctant to believe the second respondent's version especially in light of its defence of an improvement lien. It is clear that the second respondent wilfully ignored the request of the applicant and the first respondent to return the aircraft.

[25] Accordingly I am satisfied, on the papers that the applicant has made out its case against the respondents, which entitles the applicant to the relief sought.

[26] **I therefore make the following order:**

1. **The second respondent is ordered to make the McDonnel Douglas 520N helicopter with registration letters ZT_RFL available to the applicant immediately, so as to enable the applicant to remove the helicopter from the second respondents (Hanger A21) situated at Rooikat Street, Aalwyndal, Mossel Bay, Western Cape Province.**
2. **The applicant is directed to remove the helicopter from the premises referred to in paragraph 1 *supra*, at a date and time to be arranged with the second respondent and the applicant assumes responsibility to arrange for transport (a low bed) to remove the helicopter and to transport the helicopter at its own cost and risk from Mossel Bay to Wonderboom Airport, Pretoria, Gauteng.**
3. **The helicopter will be inspected at the second respondents' hanger, referred to in paragraph 1 *supra*, by the Authorised Maintenance Organization (AMO) represented by Mr Black Swart of Helifix CC, who will inspect the helicopter prior to its removal from the second respondents' hangar,**
4. **In the event that the second respondent omits or refuses to comply with the order referred to in paragraph 1 *supra*, the Sheriff of this Court and /or his/her Deputy is authorised and mandated to attach the helicopter and to remove it from the**

second respondents' possession and to deliver the helicopter to the applicant ante *omnia*, and

5. **The costs are reserved.**

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SARDIWALLA J
JUDGE OF THE HIGH COURT

Date of Hearing: 19 November 2019
Date of Order : 06 December 2019
Date of Reasons: 12 August 2020

Appearances:

For the Applicant:	Adv. F W Botes SC
Instructed by:	GOTHE ATTORNEYS
For the First Respondents:	Adv. L Hollander
Instructed by:	DARRYL FURMAN & ASSOCIATES

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