

**IN THE HIGH COURT OF SOUTH AFRICA  
SOUTH GAUTENG HIGH COURT  
JOHANNESBURG**

**CASE No. 2010/10766**

**DATE: 04/11/2010**

**Reportable in the electronic law reports only**

In the matter between:

**NEDBANK LIMITED**

Applicant

and

**EURO BLITZ 21 (PTY) LTD**

First Respondent

**CAVALETTO 5 (PTY) LTD**

Second Respondent

**MULTI MANAGED INVESTMENTS**

**(PTY)**

Third Respondent

**MARK ANTHONY LEISHER**

Fourth Respondent

**O M MAKGATO N.O (in his capacity**

**as liquidator of OMNI AIR (PTY) LTD**

Fifth Respondent

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**JUDGMENT**

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**WILLIS J:**

[1] The applicant, in Part B of its Notice of Motion, seeks an order directing the third and/or fourth respondents to return an aircraft to the applicant failing which the sheriff is authorised to attach and remove the aircraft and deliver it to the applicant; declaring that the applicant is the lawful owner and possessor of the aircraft; declaring a sale in execution of the aircraft on 24 February 2010 to be null and void and that the sheriff repay any funds received from the third and/or fourth respondent in respect of the sale in execution to the execution creditor.

[2] The application was initially brought as an urgent application on 30 March 2010 as “Part A” of the Notice of Motion. The urgent part of the application was resolved by way of an interim interdict granted by agreement between the parties. This interim interdict, in effect, restrained the respondents from dealing with the aircraft in any way pending the resolution of Part B. The aircraft is collecting dust in the hangar where it has been since two judicial attachments and a sale in execution. Costs were reserved in respect of the interim interdict.

[3] It is the case of the first to fourth respondents (“the respondents”) that the third respondent validly purchased the aircraft at a sale in execution on 24 February 2010, and that in terms of section 70 of the Magistrates Court Act 32 of 1944 (“the Magistrates Court Act”) it consequently became the owner thereof. The applicant contends the opposite: that the sale in execution was not valid.

[4] During December 2006, the applicant purchased a 1970 Cessna 402B aircraft with registration number: ZS-AVL and engine/serial number: 402B-0029 together with its avionics, keys, log books, batteries and certificates of airworthiness from 402 Aviation CC. The applicant paid for the aircraft on 14 December 2006. The applicant became the registered owner of the said aircraft and on the same day

“on-sold” the aircraft to the fifth respondent (“Omni Air”) in terms of a written instalment sale agreement subject to the conditions contained therein. Clause 2.1 of the instalment sale agreement specifically provided that ownership of the aircraft would remain vested in the applicant until Omni Air had paid all amounts due in terms of the instalment sale agreement.

[5] As a term of the agreement of the sale of the aircraft to Omni Air an “aircraft mortgage bond” was registered in favour of the applicant. This occurred on 10 January 2007. The aircraft was duly delivered by 402 Aviation CC to Omni Air on the instructions of the applicant.

[6] Omni Air fell into arrears in terms of the instalment sale agreement. The applicant elected to cancel the agreement on 28 August 2009 on account of Omni Air’s continued failure to remedy its breach. Nevertheless, Omni Air failed to return the aircraft to the applicant. The applicant then sought and obtained a court order in this division of the High Court on 21 October 2009, under case number 38631/09 confirming cancellation of the instalment sale agreement, ordering Omni Air to return the aircraft to the applicant and authorising the sheriff to attach and remove the aircraft from the premises of Omni Air.

[7] At that time, the applicant had no information pertaining to the location or whereabouts of the aircraft and appointed “Discovery Auctions” to establish the whereabouts of the aircraft, determine the fair market value of the aircraft and to find a suitable buyer. The aircraft was located by Discovery Auctions at the premises of the first respondent. It was located at Hanger 1, Rand Airport, Germiston on 11 November 2009. There it has remained. It is common cause that, at this time, it was in the legal “possession” of the first respondent and, if not of the first respondent, then the second respondent. The sheriff has confirmed that, acting on the instructions of the applicant and pursuant to the warrant of attachment that was issued by the registrar

of the High Court consequent upon the judgment granted in favour of the applicant on 21 October 2009, went to the hangar of the first respondent on 18 November 2009, served a copy of the order and judicially attached the aircraft. For reasons of practicality, the sheriff did not, however, remove the aircraft from these premises. The respondents deny that they were made aware of this process of service of the order and the attachment by the sheriff.

[8] The aircraft came to be in possession of the first respondent by reason of the first respondent having carried out work to the aircraft at the request of Omni Air. There is no dispute that Omni Air is indebted to the first respondent and that the first respondent has a lien over the aircraft respect of work done, materials supplied and hangerage pertaining to the aircraft.

[9] Meanwhile, the second respondent obtained judgment in the amount of R42 000.00, against Omni Air in the Alberton Magistrate's Court on 11 August 2009. This judgment was for certain rentals alleged to be outstanding. The applicant was not, until some time later, aware either of the claim or the judgment granted. The second respondent then caused for the aircraft to be judicially attached on 17 November 2009 pursuant to its judgment. The aircraft was ultimately sold to the third respondent at a subsequent sale and execution on 24 February 2010 which related to the second respondent's judgment. The applicant was not, at the time, aware of the said sale in execution. Consequently, the sale took place in the absence of the applicant notwithstanding that the aircraft had been previously attached as a result of the applicant's judgment. The applicant learned of the sale to the third respondent for the first time on the 2<sup>nd</sup> March 2010. Omni Air has since been liquidated.

[10] As mentioned above, the applicant obtained an urgent interdict on 30 March 2010, restraining the respondents from dealing with the

aircraft in any way, pending the finalisation of the present application. The application initially came before me on 18 May 2010 for the consideration of Part B of the application. There has been a dispute of fact on a narrow issue: whether the third respondent bought the aircraft in good faith and without any knowledge of any defects pertaining to the sale in execution when the sale in execution took place on 24 February 2010. In view of a dispute of fact on this narrow but critical issue, I referred that issue to oral evidence.

[11] Section 70 of the Magistrates Court Act provides as follows:

**Sale in execution gives good title**

A sale in execution by the messenger shall not, in the case of movable property after delivery thereof or in the case of immovable property after registration of transfer, be liable to be impeached as against a purchaser in good faith and without notice of any defect.

Accordingly, the parties and the court were in agreement that the case turns on whether or not Mr Ivo Dos Santos Castelo Branco (“Branco”), the sole shareholder, director and chief executive (referred to by the applicant as “the controlling mind”) of the first, second and third respondents was aware at the time of the sale in execution of the aircraft of the applicant’s ownership and the attachment thereof, consequent upon the judgment in favour of the applicant.

[12] Oral evidence was led on 27 May, 8 September and 4 October 2010. It is clear that the hangar where the aircraft has been at all critical stages in this saga is owned by the second respondent and that the first respondent conducted a business as aircraft maintenance organisation from the same premises. It is common cause that Ms Diane Du Pisanie (“Du Pisanie”) has been at all material times in the permanent employment of the first respondent as a receptionist at the premises

where the first and second respondents conduct their business. Mr Pelser, the sheriff, testified that on 18 November 2009 he served a copy of the court order under case number 38631/09 and the writ of attachment on Du Pisanie. This is confirmed by his return of service at the time, although he records therein that he served on a Ms “Du Plessis”. I shall revert to this aspect later. The sheriff testified that, in addition, he served the following documents on the Du Pisanie all of which she admitted having received at the time these were served on her:

- (i) all documentation pertaining to the action instituted by Wesbank against Omni Air;
- (ii) all the legal documentation pertaining to the legal action instituted by Imperial Bank against Omni Air;
- (iii) all legal documentation pertaining to the legal action instituted by the second respondent against Omni Air;
- (iv) the present application.

None of the respondents had any person in a similar position to that of Du Pisanie in their employment at the premises. Du Pisanie did, however, perform certain secretarial and administrative functions on behalf of the second respondent from time to time. In the execution of her duties on behalf of the first respondent Du Pisanie spoke to Branco on a daily basis and she agreed that she always, without exception, handed legal documents served on her to Branco and that, had the warrant of attachment of 18 November 2009 been served on her she would have given it to Branco. Although Du Pisanie’s contract of employment was with the first respondent, it is clear that in her mind she worked for Branco. Before analysing the evidence any further, I

pause to observe that, although the return of service relating to the service of the attachment on 18 November 2009 records that it was served on a certain person called “Du Plessis”, it is clear that this is an error. The person must have been Du Pisanie not only because the sheriff identified her, is an independent witness and at the time of service of the writ of attachment would have had no idea that this dispute would arise but also there is no person by the name of “Du Plessis” at the premises. The names “Du Plessis” and “Du Pisanie” are so similar that it is easy for a mistake of this nature to have been made by the sheriff.

[13] It is common cause that Du Pisanie was contacted by a certain Cindy-Lee Koster (“Koster”) from Discovery Auctions during or about 11 November 2009 for the first time and that they had regular communication with each other thereafter. Koster made certain enquiries in relation to the aircraft to Du Pisanie. These included establishing whether the aircraft was located at the premises, requesting a photograph of the aircraft, informing Du Pisanie that she required the aircraft in order to show it to prospective purchasers and enquiring whether there were any amounts due and owing to the first respondent pertaining to the aircraft. Koster also requested from Du Pisanie copies of all the invoices of the alleged amounts due which Du Pisanie provided to her at request and thereafter on a monthly basis.

[14] It is also common cause that a certain Mr Marthinus Oberholster (“Oberholster”) of Corporate Services (Pty) Ltd who came to the premises in order to inspect the aircraft and that Oberholster enquired from Du Pisanie whether a start run on the engines of the aircraft could be done. It is clear that Du Pisanie had been aware of a standard policy that to start the engines of any aircraft at the hangar the written consent of the owner of the relevant aircraft was required that she advised Oberholster of this requirement, insisting on receiving written consent from the owner before a start run would be allowed to test the engine. Du Pisanie

communicated via e-mail with Oberholtster on the 11 January 2010. Oberholster's evidence was that he sent her an attachment to an email which indicated that the applicant had consented to the start up of the engines. Du Pisanie also had a conversation with a person which at the time she could not recall but later on appeared to be Mr Christo Verhoefen ("Verhoefen") acting for the applicant during or about 2 March 2010. In addition, she had a further discussion with the same person later on that day in terms of which she advised him that she was in possession of a return of service from the sheriff in respect of a different aircraft relating to Imperial Bank Limited.

[15] Du Pisanie testified that:-

- (i) she was never told nor was she aware of the applicant's ownership of the aircraft;
- (ii) the sheriff had not served on her the court order and the writ of attachment under case number 38631/09;
- (iii) she was not aware of the applicant's aircraft mortgage bond;
- (iv) there was no attachment to Oberholster's email;
- (v) she did not inform Branco about the applicant's interest or the conversations with Koster, Oberholster or Verhoefen.

Du Pisanie conceded, however that she spoke to Branco on a daily basis and that she immediately brings to his attention all important documents, such as legal notices, which come before her.

[16] Mr Graham Burrell ("Burrell"), the first respondent's maintenance engineer, testified that he did not see a letter that Oberholster brought with him to the hangar which recorded the applicant's interest in the aircraft. This is not inconsistent with the evidence of Oberholster that he did not actually give the letter to Burrell.



[17] Branco testified that he was not aware of the Applicant's ownership of the aircraft at the time of the sale in execution and only became aware thereafter that the applicant had an interest in the aircraft. He said that Du Pisanie never told him about any of her dealings in this matter with Pelser, Oberholster, Koster or Verhoefen such that he would have been aware of the applicant's interest in the aircraft. He claimed that had he been aware of the applicant's ownership of the aircraft he would not have purchased the aircraft as he would not have wanted to become involved in litigation with the applicant. Branco concedes that he bid for the aircraft at "an absolute bargain". Standing on its own, the evidence of Branco cannot be rejected.

[18] In determining the factual dispute in this case, I shall have regard to the principles set out in the well known case of *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*<sup>1</sup>:

The technique generally employed by courts in resolving factual disputes of this nature, may conveniently be summarised as follows. To come to a conclusion on dispute of issues, a court must make findings on:

- (a) The credibility of the various factual witnesses;
- (b) Their reliability; and
- (c) The probabilities.

As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness, that in turn will depend on a variety of subsidiary factors, not necessary in orderly importance such as:-

- i) The witness' candour and demeanour in the witness-box;
- ii) His bias, latent and blatant;
- iii) Internal contradictions in his evidence;

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<sup>1</sup> 2003 (1) SA 11 (SCA) at para [5]

- iv) External contradictions with what was pleaded or put on his behalf, with established fact or with his own extracurial statements or actions;
- v) The probability or improbability of particular aspects of his version;
- vi) The calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events.

As to (b), a witness' reliability will depend apart from the factors mentioned under (a), (ii), (iv) and (v) above, on (i), the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof.

As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessments of (a), (b) and (c), the court will then, as a final step, determine whether the party burdened with the onus on proof has succeeded in discharging it.

The hard case, which will doubtless be the rare one, occurs when a court's credibility finding compel it in one direction and its evaluation of the general probabilities on the another. The more convincing the former, the less convincing will leave the latter. But when all factors are equipoised probabilities will prevail.

[19] Du Pisanie did not impress me as a witness. She was frequently evasive. Moreover, I cannot believe, in the circumstances, that the sheriff would have lied about the fact that on 18 November 2009 he served the court order and writ of attachment of the aircraft that was issued by the registrar of the High Court consequent upon the judgment granted in favour of the applicant on 21 October 2009. Furthermore, the sheriff's evidence is corroborated by a return of service, issued at a

time when the sheriff would have had no inkling of the events that have given rise to the present dispute. As I have said, the “Du Plessis” to whom he has referred in his return can only have been Du Pisanie. It is most unlikely that Pelser, Oberholster and Verhoefen should have conspired to give false evidence that she must have been aware of the applicant’s interest in the aircraft. It is “too much of a coincidence” that, at every critical turn, Du Pisanie should have been unaware of the applicant’s interest in the aircraft. Not only is it inherently probable that had she had been aware of the applicant’s interest and especially the sheriff’s service of the court order and the writ of attachment but also it is her own evidence that she would have informed Branco accordingly. When the evidence is viewed as a whole, the probabilities favour the applicant.

[20] The parties have agreed that, in the event that the applicant succeeds in recovering the aircraft, the order which I make should protect the respondents’ claim in respect of the lien. This claim is alleged to be for R172 897.41.

[21] The following order is made:

- (a) The first and/or second and/or third and/or fourth respondents are to deliver up and return to the applicant the 1970 Cessna 402 B aircraft with South African Registration Number ZA-ALV having engine / serial number 402B-0029, together with the avionics, logbooks, keys, batteries and certificates of airworthiness (hereinafter collectively referred to as "the aircraft");
- (b) In the event that the aircraft is not returned to the applicant, as aforesaid, the sheriff of the court is authorised to attach and remove the aircraft from the possession of any of the respondents or wherever same may be found and deliver it to the applicant;

- (c) The applicant is declared to be the lawful owner and possessor of the aircraft;
- (d) Any purported sale of the aircraft between the fourth and third respondents which may have taken place during or after the 18 November 2009 is be declared null and void and of no force or effect;
- (e) The purported sale in execution by auction of the aircraft by the sheriff on the 24 February 2010 is declared to be null and void and of no force or effect;
- (f) The sheriff who conducted the purported sale in execution of the aircraft on 24 February 2010 is directed to refund to the purported purchaser any moneys received as a consequence of that sale;
- (g) The applicant is to put up security to the satisfaction of the registrar of this court in an amount of R172 897.41 being the amount alleged to be due to the first, alternatively the second, alternatively the third respondent arising from a lien in respect of the aircraft;
- (h) The first, second and third respondents are to institute an action against the applicant for the claim arising in respect of the alleged lien within 90 days of the date of this order, failing which the applicant's obligation to furnish security as aforesaid shall lapse;
- (i) The first, second, third and fourth respondents are jointly and severally liable, the one paying the other to be absolved, to pay the applicant's costs in this application, which costs shall include the costs reserved on 30 March 2010 and any other costs that may have been reserved.

**DATED AT JOHANNESBURG THIS 4<sup>th</sup> DAY OF NOVEMBER, 2010.**

**N.P. WILLIS**

**JUDGE OF THE HIGH COURT**

Counsel for the Applicant: *S.Aucamp*

Counsel for the Respondents: *L. Hollander*

Attorneys for the Applicant: Lanham-Love

Attorneys for the Respondents: David Kotzen

Date of hearing: 18<sup>th</sup> & 27<sup>th</sup> May, 8th September, 4<sup>th</sup> & 27<sup>th</sup> October, 2010.

Date of judgment: 4<sup>th</sup> November, 2010