

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

18/11/2013

CASE NO: 56638/13

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

ASTRAIL AVIATION ONE LTD

APPLICANT

and

THE SOUTH AFRICAN CIVIL AVIATION AUTHORITY

1ST RESPONDENT

THE DIRECTOR OF CIVIL AVIATION

2ND RESPONDENT

MPOYANA LAZARUS LEDWABA N.O

3RD RESPONDENT

KGASHANE CHRISTOPHER MONYELA N.O

4TH RESPONDENT

CHAVONNES BADENHORST ST CLAIRE COOPER N.O

5TH RESPONDENT

AVIWE NTANDAZO NDYAMARA N.O

6TH RESPONDENT

JOHANNES ZACHARIAS HUMAN MULLER N.O

7TH RESPONDENT

JUDGMENT

KHUMALO J

[1] The Applicant, an Irish based aviation company with limited liability and its registered business address in Dublin 2, Ireland is seeking an order in the following terms:

- [1.1] Declaring that the existing aircraft mortgage registered with the 1st Respondent on the South African Aircraft Mortgage Register under SACAA Aircraft Mortgage Number 0011/2012/AM ("the mortgage") over the aircraft with serial number 49829, being a McDonnell-Douglas DC-9-87 aircraft with South African registration letters ZS-TRJ ("the aircraft") is discharged alternatively of no force or effect, and null and void.

Alternatively,

- [1.2] that the 1st Respondent and/or the 2nd Respondent be directed to discharge the mortgage over the aircraft;
 - [1.3] that the 1st and or 2nd Respondent be directed to make an entry in the South African Aircraft Mortgage Register to the effect that the mortgage has been discharged, and to cancel the deed of mortgage under mortgage number 0011/2012/AM.
- [2] Applicant is also seeking in terms of a notice of amendment served subsequent to the Application an order as follows:
- [2.1] declaring that the 1st Respondent and/or 2nd Respondent are entitled to effect the registration of the aircraft into the name of the Applicant.
 - [2.2] the 3rd to 7th Respondents in their capacities as the appointed provisional liquidators of 1 Time Airline (Pty) Ltd (in provisional liquidation) are directed to take all such steps as may be necessary to enable the 1st Respondent and/or the 2nd Respondent to effect the registration of the aircraft into the name of the Applicant." (" The additional relief")
- [3] The aircraft is registered in the aircraft mortgage register in the name of 1 Time Airline (Pty) Ltd ("I will also refer to it as "1Time"), a South African low cost airliner. 1 Time bought the aircraft from Safomar on February 2009. The 3rd to 7th Respondents are cited in their representative capacities as liquidators of 1 Time.
- [4] First Respondent is the South African Civil Aviation Authority, established in terms of s 71 of the Civil Aviation Act 13 of 2009 (' Aviation Act') and is the registering authority responsible for, *inter alia*, the registration of deeds of aircraft mortgage and lease agreements. 2nd Respondent is the director in the employ of the 1st Respondent.
- [5] Even though there was no formal opposition to the Application, 1st and 2nd Respondent filed answering Affidavits and had Counsel in attendance who confirmed that the purpose of his presence and 1st and 2nd Respondent's filing of papers was to assist the court in making a determination on the orders sought by the Applicant by bringing to the attention of the court the processes involved.

FACTUAL BACKGROUND

- [6] In terms of a resolution filed by Applicant, its board of directors resolved on 19 October 2011, in Dublin to give one Maria Macnamara, a director, a power of attorney authorizing her to appoint one Alan Kane to represent, act and sign on behalf of the Applicant, documents for registration of the mortgage deed as a continuing covering security for the repayment by 1 Time of its indebtedness to the Applicant arising from the mortgage. The resolution further resolved, *inter alia*, that:
- [6.1] Applicant enter into a purchase agreement with 1 Time to purchase the aircraft.
 - [6.2] Applicant enter into a Lease Agreement, in respect of the aircraft.

- [6.3] 1 Time (as Mortgagor) being indebted to Applicant in terms of a Lease Agreement in paragraph 6.2. in an amount of US\$936,000,00 (nine Hundrend and Thirty six Thousand United States Dollars) requires a first deed of mortgage to be registered over the said aircraft in favour of Applicant as mortgagee as a continuing covering security for the repayment by 1 Time of its indebtedness to the Applicant.
- [6.4] 1 Time as (Mortgagor) agrees and consents to Applicant registering an Aircraft Mortgage in terms of the Convection on the International Recognition of Rights of Aircraft Act 1993 (Act no 59 of 1993) and Mortgaging of Aircraft Regulations 1997, over the aircraft.
- [7] On the day of the signing of the resolution, a Deed of Mortgage ("mortgage") was concluded by 1 Time as the mortgagor and sole beneficial owner of the aircraft ZS-TRJ, a DC -9-87 executing the deed in favour of the Applicant as mortgagee that had advanced to 1 Time a loan facility in the sum of US \$1,500,000.00 (One Million Five Hundrend Thousand Dollars) on the terms and conditions contained in an Aircraft Purchase Agreement entered into between the parties on 19 October 2011, the proceeds of which have been applied by 1 Time towards the acquisition of the Aircraft, which it has agreed to provide the mortgagee with security for the loan facility.
- [8] The mortgage deed also recorded that the parties on that date, the 19th October 2011 entered into an Aircraft Lease Agreement for a period of 36 months commencing on the date of the contract, in terms of which 1 Time as lessee has an option to purchase the aircraft from the Applicant as lessor against payment of an amount of US\$936, 000.00
- [9] 1 Time, its successors and assigns warranted to the Applicant its successors and assigns and declared that it has the power to mortgage in the manner aforesaid the abovementioned aircraft and that the said aircraft is free from any encumbrances of purchase referred to and 1 Time is the seller and Applicant the buyer.
- [10] An Application signed by M J Kominski, a director of 1 Time and commissioned by Applicant's attorney of record S T Farrel, was on the same day submitted to the 1st Respondent by delivery to the 2nd Respondent for registration of the deed of mortgage in accordance with the Convection on the International Recognition of Rights in Aircraft Act 59 of 1993 in respect of which 1 Time as the mortgagor in consideration for US\$936,000.00, the capital sum advanced to it as mortgagor by the Applicant as mortgagee contracts with the Applicant for the capital sum together with interest thereon as in the deed of mortgage. On 3 February 2012, 1st Respondent issued a Certificate of Recording in the South African Register of Aircraft Mortgages.
- [11] An Aircraft purchase agreement in terms of the resolution was also on that day, the 19th October 2011, concluded between the parties, signed by R L James and P Duffy on behalf of 1 Time and A Kane on behalf of the Applicant, in terms of which 1 Time as the beneficial owner and seller sold and transferred the beneficial title to the aircraft at the delivery date and time for a purchase price of US\$1,500,000.00 an amount of which was to be paid by the Applicant in full in cash against Delivery, that was to occur on a business day into the seller's standard bank account in Boksburg.

- [12] 1 Time was to effect transfer of title to the aircraft to Applicant on the delivery date by executing the bill of sale to Applicant against payment of the purchase price in accordance with the aforementioned paragraph after which title in and to the aircraft was to be delivered free and clear of all encumbrances whatsoever. The parties acknowledged that 1 Time was in possession of the aircraft and no physical delivery of the aircraft was to be effected and that the deed of purchase did not constitute an instrument for the transfer of title.
- [13] The Bill of Sale formed part of the purchase agreement and in terms thereof 1 Time as the beneficial owner of the aircraft who has entered into a sale agreement with the Applicant pursuant to which the aircraft was to be sold and delivered to the Applicant by 1 Time sold, transferred and delivered all rights, title and interest to and in the aircraft to the Applicant.
- [14] The agreement was not to be modified, varied or amended except by a written agreement on the signature date or subsequent thereto signed on behalf of the Applicant and 1 Time by their duly authorised respective officers or representatives.
- [15] A document with a heading Deregistration Power of Attorney was also signed on 19 October 2011 in terms of which 1 Time agreed that it entered into a Lease Agreement in terms of which Applicant agreed to lease the aircraft to it, however recording that 1 Time is the registered owner of the aircraft in the aircraft register of the 1st Respondent and Applicant is conferred with an irrevocable and unconditional power of attorney:
- [15.1] to release, terminate and void any and all of the interests of 1 Time in and to the Aircraft.
 - [15.2] consent to the transfer of registration of the aircraft and all engines, accessories or items installed thereon at the time of such transfer.
 - [15.3] represent 1 Time in all matters and affairs whatsoever in connection with the registration, de-registration or re-registration of the aircraft and/or any interest of 1 Time in the aircraft under the lease agreement.
 - [15.4] sign, execute, do and perform on 1 Time's behalf and in its name or otherwise deliver and cause the signature, execution, delivery and or notarization of any documents or certificates with such amendments thereto (if any) which the attorney determines may be required to apply for and to obtain deregistration of the aircraft from the register of aircraft maintained by the 1st Respondent and further to obtain any permits or approvals which may be required for the export of the aircraft from South Africa or any state or country in which the aircraft is registered at the relevant time.
 - [15.5] generally do any and all such acts and things and to execute and deliver any and all documents, deeds instruments and communications as may be requested or required to give effect to any of the terms of this Power of Attorney, provided that the attorney shall not exercise any of the above

rights until an Event of Default (as defined in the Lease Agreement) has occurred and is continuing.

- [16] On 16 August 2012, Applicant sent a letter to 1 Time alleging that events of default have occurred and continuing to occur under the Lease Agreement, specifically rental for the period December 2011 to 1 August 2012, Administration Fee from October 1, 2011 to August 1, 2012 and Maintenance Reserves from November 1, 2011 to August 1 2012 and also under the Deed of Mortgage Number 0011/2012, demanding that payment of the amounts be paid by 17 August 2012.
- [17] On 31 August 2012, Applicant's attorneys sent a letter of cancellation of the Lease Agreement effective from the date of the letter.
- [18] On 7 November 2012, 1 Time was placed under provisional liquidation by an order of this Honourable Court. The 3rd to 7th Respondent together with a company called Tshwane Trust Co (Pty) Ltd ("Tshwane") were jointly appointed as Liquidators of the insolvent company.
- [19] On 8 November 2012, Applicant's attorney sent a letter to Tshwane alleging that the letter of cancellation of the Lease Agreement dated 31 August 2012 entitled Applicant to retake possession of the aircraft (together with others) with immediate effect from wherever it was parked requesting Tshwane for an unconditional confirmation failing which Applicant was going to reclaim possession of the aircraft by means of a vindicatory action.
- [20] On 9 November 2012 one I J Boschhoff, a Tshwane director, sent a letter confirming that the liquidators do not object to the removal of the leased assets to Upington Airport. He on 28 November 2012, sent a more comprehensive letter confirming that the Lease Agreement has been terminated and that the liquidators have no objection to Applicant taking possession and disposing of the said aircraft and the associated engines as it deem fit.
- [21] On 14 November 2012, Applicant took possession of the aircraft.
- [22] On 3 July 2013 Applicant's attorney sent a letter to the provisional liquidators c/o Tshwane Trust Company mentioning the Deed of Mortgage, the loan facility therein and its utilization for the acquisition of the Aircraft, the lease agreement with an option to purchase the aircraft from the mortgagee against payment of US\$ 936,000.00, to highlight the Applicants rights with respect to the ownership of the aircraft and alleging to have been instructed to discharge the existing Deed of Mortgage.
- [23] F J Cohen, an attorney, on 6 August 2013 sent a response on behalf of the provisional liquidators requesting information with regard to the date of signature, delivery, proof of payment of the purchase price, requesting also copies of the purchase agreement, bill of sale, a copy of the signature page of the lease agreement, the acceptance certificate and proof of payments made by 1 Time in terms of the lease, legible Deed of Mortgage, information on the advance made, the loan facility, when made and to which account paid and how the amount of US\$936, 000.00 payable by 2014 becomes part of the lease agreement.

[24] Applicant's attorney then sent a letter to 1st Respondent dated 20 August 2013, alleging that 1 Time owes Applicant an amount exceeding US\$1,500,000.00 in arrear rental arising from leases of several of Applicant's aircrafts by 1 Time, further that Applicant did not advance the sum of US\$1,500,000.00 as reflected in the deed of mortgage, however that the purchase of the aircraft took place with Applicant applying set off against the purchase price and consequently acquiring ownership of the aircraft, as a result the Deed of Mortgage had no legal effect. Delivery was fictional, however from that date Applicant became the lessee of the aircraft and such lease was cancelled on 30 August 2012, wherefore instructing 2nd Respondent to rectify its records, failing which they were going to bring this Application.

[25] 1st and 2nd Respondent refused to accede to the demand without the Applicant supplying the information requested by FJ Cohen and because of the new allegations by Applicant that contests the information in the Deed of Mortgage.

APPLICATION

[26] Applicant as a result seeks the relief as prayed alleging that:

[26.1] it became the owner of the aircraft on 19 October 2011, pursuant to the delivery of the Bill of Sale when the title and the passing of the beneficial ownership, in and to the aircraft was effected from 1 Time to Applicant.

[26.2] Despite passing of ownership, in terms of the agreement of lease that henceforth 1 Time was to lease the aircraft, the parties agreed that 1 Time remains in possession of the aircraft, having been in its possession prior to 19 October 2011 in its capacity as owner and from henceforth was in its capacity as lessee and Applicant as the owner.

[26.3] As at 19 October 2011, 1 Time was indebted to the Applicant in the liquidated amount of US\$1 979,642.00 for lease payments and related charges in respect of other aircraft that the Applicant had leased to 1 Time, such amount being due and payable to Applicant. The purchase price of US\$1,500,000.00 was paid by way of set off against the liquidated amount.

[26.4] Whereas in the deregistration of power of attorney, 1 Time is recorded as the registered owner of the aircraft in the aircraft register, such registration does not mean 1 Time is in fact the owner of the aircraft. In terms thereof as security for the performance of 1 Time's obligations under the lease agreement, 1 Time conferred an irrevocable and unconditional power of attorney in favour of Applicant to release terminate and to void any and all the interests of 1 Time in and to the aircraft, do all such acts and consent to the transfer of registration of aircraft and all its engines, accessories or items installed thereon at the time of such transfer.

[26.5] The Deed of Mortgage was erroneously prepared and contains various factual and legal errors as a result of extreme time constraints that various agreement had to be prepared and signed on the same day. The application and the recital were not properly checked and contain a number of factual errors such as:

- [26.5.1] The Applicant did not advance to 1 Time the sum of US\$1,500,000.00 as a loan facility at all. 1 Time was indebted to the Applicant in respect of arrear lease payments and related charges as at 19 October 2011.
- [26.5.2] The Applicant was in fact the owner of the aircraft at date of signing of the Application for registration therefore the recital in the recital is incorrect as it is not possible in law to be the mortgagee in respect of one's property. The Application for the registration of the mortgage ought never to have occurred and was mistakenly submitted to the 1st Respondent for registration.
- [26.7] 1 Time has continually defaulted in respect of the lease agreement and on 31 August 2012 Applicant accordingly cancelled the lease agreement.
- [26.8] The liquidators confirmed that the lease agreement between Applicant and 1 Time has been terminated. Applicant was therefore entitled to take possession of the aircraft and liquidators had no objection.
- [26.9] The liquidators have failed after repeated requests to provide the documentation needed for purposes of issuing a certificate of registration in the name of Applicant.
- [26.10] Accordingly Applicant was informed that in order to amend the certificate of registration of the aircraft it was necessary to first discharge the deed of mortgage. The 1st Respondent refuses to accede to the request and liquidators are non-committal.

ANSWERING AFFIDAVIT

[31] In their answering affidavit 1st and 2nd Respondents' highlighted the following, *inter alia*:

- [31.1] that in terms of the records at their disposal, the owner of the aircraft is 1 Time.
- [31.2] they have not been provided with a copy of a lease agreement concluded in respect of the aircraft (contrary to par 48.02.1 of the Civil Aviation Regulations, 2011) which is an integral part of the mortgage.
- [31.3] The Application for the registration of the deed of mortgage submitted to the 1st Respondent and registered on 8th February 2012 was signed by M Kaminski sworn before a Commissioner of Oaths who is the legal representative of the Applicant, that 1 Time as the mortgagor, its successors and assigns warrant to the mortgagee and declare that 1 Time has the power to mortgage in the manner as described in the deed of mortgage, the aircraft in question, which is free of encumbrances.
- [31.4] the mortgage is recorded to be securing the grant of a loan facility and in compliance with the provisions of the aircraft Lease Agreement.

- [31.5] It is stipulated that 1 Time agrees to pay US\$936,000.00 to the Applicant on 19 October 2014 or such later date as the Applicant shall agree.
- [31.6] The mortgage is said to be the security which shall be held by the Applicant as a continuing covering security for the due performance of 1 Time's obligations to the Applicant in terms of the aircraft lease agreement and the mortgage.
- [31.7] further stipulated in the mortgage is that when 1 Time fulfills all its obligations to the Applicant in terms of the aircraft lease agreement and the mortgage, then the mortgage and the rights thereunder shall cease and determine, but shall remain in full force and effect until cancelled by the Applicant.
- [31.8] The deed of mortgage describes "Obligations" to mean the mortgagor's payment obligations to the mortgagee as required in terms of the aircraft lease agreement and as provided for in the mortgage. Whilst "Security Period" means the period commencing on the date upon which the mortgage is registered and terminating on the due fulfillment of all the mortgagors' obligations to the mortgagee in terms of the aircraft lease agreement.
- [31.9] Any notification of discharge of a mortgage shall be submitted to the 1st Respondent on a prescribed form which requires confirmation that the loan capital secured by the mortgage has been settled.
- [31.10] Applicant's legal representative was furnished with the power of attorney to sign such other documents as may be necessary to attend to the registration of the mortgage in terms of Act 59 of 1993 and the mortgaging of Aircraft Regulations 1997. A resolution taken by the directors of the Applicant was filed with 1st Respondent confirming the indebtedness of 1 Time to Applicant in the amount of US\$936,000.00 in terms of the lease agreement and 1 Time consenting to the registering of the aircraft in terms of the Act 59 of 1993.
- [31.11] The estate of 1 Time since liquidation fell under the control of the 3rd to 7th Respondent.
- [32] The following preliminary issues have a critical bearing on the substance of the matter, postured a challenge to the success of this Application.
- [32.1] Tshwane is a joint provisional liquidator with 3rd to 7th Respondent and incontrovertibly an interested party in the matter however has not been cited as a party in the Application.
- [32.2] In terms of the Applicant's resolution, the legal proceedings were to be instituted against all the liquidators including Tshwane.
- [32.3] Notwithstanding being cited in their individual representative capacity, 3rd to 7th Respondents have been served jointly at the offices of Tshwane, the uncited provisional liquidator. The service is therefore improper.
- [32.4] The letters confirming that Applicant can take possession of the aircraft was issued by Tshwane at the time when 1 Time was already placed under

provisional liquidation without any consensus from the other liquidators or creditors and the Master's consent.

[32.5] The aforementioned conduct is therefore in contravention of the Companies Act 1973 ('the Act') that in s 382 provides that:

"When two or more liquidators have been appointed they shall act jointly in performing their functions as liquidators and shall be jointly and severally liable for every act performed by them jointly.

and also of s 386 (4) of the Act.

[32.6] The lease Agreement/s from which 1 Time's indebtedness is alleged to have arisen and upon which the Applicant relies for the relief it seeks was not annexed to the Application.

[32.7] No averments has been made with regard to the fulfillment or non- fulfillment of the obligations with respect to the consideration of the capital sum of US\$ 936,000.00 that was owing to Applicant allegedly by 1 Time and in respect of which the first deed of mortgage was registered over the aircraft as a continuing covering security repayable in 2014.

[32.8] Even though the Power of attorney and the resolution by Applicant signed by Maria Macnamara on 19 October 2011 accords with the Deed of Mortgage, application for registration thereof and the purchase agreement concluded by Alan Kane on behalf of the Applicant on the same date and also with the letter by S T Farrell on behalf of Applicant dated 3 July 2013, no affidavit, confirmatory or supporting has been filed by the authors or signatories of all these documents to refute or explain the contradictory allegations raised in the Applicants Founding Affidavit in respect of the contents of these documents.

[32.9] The refusal by the 1st and 2nd Respondent to accede to the Applicant's requests is under the circumstances justified. A proper case has not been made for the relief sought by the Applicant and I therefore make the following order:

[32.9.1] Application is dismissed.



N V KHUMALO J

JUDGE OF THE HIGH COURT