



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG PRETORIA DIVISION)**

CASE NO.: 35554/09

In the matter between

NATIONAL AIRWAYS CORPORATION (PTY) LTD.

Applicant

And

BEAGLES RUN INVESTMENTS 25 CC

Respondent

CORAM: EBERSOHN AJ

JUDGMENT HANDED DOWN ON 17th AUGUST 2009

JUDGMENT

EBERSOHN AJ.

[1] In this matter the applicant instituted the main application against the respondent on the 17th June 2009 and in the notice of motion asks for an order regarding the payment of a certain sum alternatively the return to it of 2 Pratt & Whitney aircraft turbine engines with propellers with ancillary relief.

[2] The application is opposed.

[3] The history of the matter is not complicated. The respondent is the owner of a Beechcraft fixed wing aircraft with registration number ZS-BHK. The applicant rebuilt and upgraded the engines and propellers of the aircraft and in terms of the agreement between the parties the applicant retains ownership of the engines and propellers until the full amount owing with regard thereto has been paid.

[4] In the first week of November 2008 the respondent undertook irrevocably in writing to make payment of the agreed amount owing namely R8 987 808,00 into the bank account of the applicant. This agreement was referred to as the "November" agreement.

[5] The respondent failed to make the payment and apart from a payment of R1 500 000,00 on 17 December 2008 and a recovery of an amount of R3 135 000, 00 in consequence of the agreed sale of an engine for which the applicant credited the respondent with, the balance of R4 352 808,00 remained unpaid.

[6] There is another amount owing by the respondent to the applicant, according to the applicant, with regard to other work done on behalf of and materials supplied to the respondent in the total amount of R101 488,97. The applicant also seeks to recover this amount in the main motion proceedings and the applicant regards the defences that the respondent raised in connection with the payment thereof, as contrived and demonstrably false.

[7] It is the applicant's case that the respondent is an empty shell and the urgency is inter alia based on a fear of economic loss coupled to the fact that the respondent is using the aircraft.

[8] In December 2008 the respondent alleged certain defects and snags with the aircraft. The applicant invited the respondent to return the aircraft in order for it to correct the alleged snags and carry out repairs that might have been necessitated in consequence. The applicant's workmanship was under guarantee and the parts that had been supplied were under the manufacturer's warranty. Such repairs would have been carried out swiftly without any cost to the respondent and by the applicant according to the deponent to the applicant's founding affidavit. The respondent declined to bring in the aircraft. The aircraft was grounded through May and June 2009 in terms of the Civil Aviation Regulations.

[9] On the 17th June 2009 the respondent brought an urgent application to the Civil Aviation Authorities ("CAA") for exemption from the requirements of certain Civil Aviation Regulations so that the grounding of the aircraft by the CAA could be lifted. The applicant opposed that application on the grounds that it was not urgent and that the exemption which the respondent was seeking would compromise aviation safety and that if the exemption was granted it would interfere in the contractual rights of the parties. The Commissioner of the CAA decided the matter in the favour of the respondent and the aircraft was no longer grounded. The applicant immediately wrote to the respondent seeking an undertaking that it would not seek to utilise the engines

and propellers pending the outcome of the main application. The undertaking was not given by the respondent.

[10] In the result the applicant brought the urgent application currently before the Court seeking an interim interdict prohibiting use of the engines and propellers pending the outcome of the main application.

[11] Answering and replying affidavits were filed.

[12] It was argued on behalf of the applicant that this case falls squarely within the ambit of the Luna Meubels case justifying a departure from the requirement that all the affidavits be indexed and paginated by 12:00 on the Thursday before the Tuesday that the matter is set down. The value of the engines and propellers, according to the applicant is in excess of RIO 000 000,00 and it is a significant commercial interest which is worthy of urgent protection. (See 20th Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd. 1982 (3) SA 582 (W) per Goldstone J. as he then was.)

[13] It is the applicant's case that the respondent obtained possession of the aircraft only by false pretences in November 2008 by raising, according to the applicant, false claims to the Commissioner for Civil Aviation regarding its application and certain reports that it claimed it had. It raised, according to the applicant, baseless, unliquidated and unsubstantiated counter claims in an effort to stall the applicant in its claim for the recovery of the amount the respondent undertook to pay.

[14] After the 17th June 2009 there was the main application asserting the applicant's rights of ownership which was sub judiciae and according to the applicant required determination before the respondent could use the engines and propellers in the aircraft.

[15] It is not disputed that the applicant remains the owner of the goods supplied until payment of the project has been made in full. I do not understand the case of the respondent to be that all the payments especially for the engine sold and the other payments were specifically made with regard to the price of the engines and propellers and accordingly the applicant could allocate those payments itself and on the face of it the engines and propellers have not been paid in full for.

[16] The respondent disputed urgency in this Court. I am, however, satisfied that the matter is urgent. The applicant has made out a case that the balance of convenience favours it and that there exists a danger of irreparable harm and the interim order should be granted.

[17] I accordingly make the following order:

1. The application is dealt with as an urgent application.

2. Pending the final outcome of the main application instituted and pending between the parties under the above case number and issued out of this Court on the 17th June 2009, the respondent is interdicted from causing or permitting certain:

2.1. 2 X Pratt & Whitney PT6-61 Gas Turbine Engines with serial numbers HA0033 and HA0034; and

2.2. 2 X Raisbeck EPIC Four blade propellers with serial numbers FY3216 and FY3171

presently on the Beechcraft King Air fixed wing aircraft with registration number ZS-BHK, Serial Number BB-387, from being used or utilised, and/or leaving the jurisdiction of this Honourable Court.

3. The respondent is ordered to pay the costs of this application.

P.Z. EBERSOHN

ACTING JUDGE OF THE HIGH COURT

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