REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 21/27401

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

…… 10/03/2023…
SIGNATURE DATE

In the matter between:

MERCHANT WEST (PTY) LTD	**Applicant**

and

HELLMANN, DENISE	**First Respondent**
CDC AVIATION (PTY) LTD (IN LIQUIDATION)	**Second Respondent**
SOUTH AFRICAN CIVIL AVIATION AUTHORITY	**Third Respondent**

In re: -

HELLMANN, DENISE	**Plaintiff**

and

SOUTH AFRICAN CIVIL AVIATION AUTHORITY	**First Defendant**
CDC AVIATION (PTY) LTD (IN LIQUIDATION)	**Second Defendant**

MERCHANT WEST (PTY) LTD **Third Defendant**

JUDGMENT

MANOIM J:

[1] This is an application for leave to appeal. The applicant was a defendant in the case that is the subject of the appeal but had also brought a counterclaim against the plaintiff ("the respondent in the leave to appeal") For ease of reference I will from now on refer to the applicant as MW (short for "Merchant West", which was the third respondent in the case) and the first respondent in the application as Denise (short for "Denise Hellmann", who was the plaintiff in the case and is referred to by her first name as her son and grandson were also witnesses and central players in the case).

[2] The question in the case and which is now the subject of the leave application is who rightfully owned an aircraft which a fraudster had sold, on different occasions to both Denise and MW. Denise based her ownership claim on delivery whilst MW relied on *constitutum possessorium*.

[3] In my decision dated 18 January 2023, I found for Denise. MW now seeks leave to appeal this decision to the Supreme Court of Appeal.

[4] In brief the salient facts relevant to the leave to appeal are these. Denise entered into a sale agreement with the fraudster; a man called Van Blerk, acting on behalf of his company then known, as CDC, the second defendant in the case. CDC was the local agent for a US company that manufactured the aircraft. Denise paid for the aircraft and was to take ownership once it had been delivered from the United States where it was being made up to her specifications. Denise had arranged with Van Blerk that her son Neill would accompany CDC staff to take delivery of the plane which would then be flown back to South Africa. This all took place between May and 28 October 2019.

[5] Subsequent to the sale to Denise, and after she had already paid CDC the full purchase price, which Van Blerk had then paid on to the US company, Van Blerk then entered into two back to back agreements with MW, the subject matter of which was the same aircraft he had just sold to Denise. These are variously dated by the signatories from 31 October to 4 November 2019.

[6] MW is a financial institution, which inter alia, provides financing for the purchase of aircraft. In the first agreement, the sale agreement, Van Blerk on behalf of CDC sold the aircraft ("the same one he had already sold to Denise") to MW. In terms of the second agreement, the instalment sale agreement, MW sold the aircraft back to CDC provided it met the instalment payments over a period of five years. In the meantime, until full payment was made CDC would be allowed use and possession of the aircraft, but MW reserved its ownership of the plane.

[7] Crucial to my decision in this case are the dates when delivery was alleged to have taken place. In terms of the first agreement and this is stated specifically in these terms in the agreement, CDC was: *"currently in possession of [the aircraft] and would deliver it to MW which would acquire ownership by constitutum possessorium on the effective date."* The effective date was defined as the signing of the Master Instalment sale agreement (i.e., the second agreement). This agreement was signed by CDC on 31 October 2019. Hence that was the effective date. However even if one allows for the date to be a later date viz. When MW signed – that date would have been 5 November 2019. MW made payment of the sale price in term of the first agreement on the 5th November.

[8] However, on that date ("5th November") the plane was still in the United States and still owned by the US company. It was only on the following day ("6th November 2019") that Neil took possession of the plane from the US company in the United States. He did so in terms of a power attorney given by CDC to the US company. Thus, on 6 November CDC acquired ownership of the plane. This fact is common cause. Thus, contrary to the terms of the agreements by 5

November 2019, CDC neither possessed the plane nor could have delivered it to MW on that date by *constitutum possessorium*.

[9] Neill then flew the plane back to South Africa where it landed at Lanseria airport on 23 November 2019. On that day Denise awaited him in the company of inter alia, Van Blerk. Denise claims that she took ownership of the plane by delivery on that date. CDC has since been liquidated. It did not pay the instalments to MW in full although it did make payment for some time. Neither MW nor Denise were aware of the other's purchase until CDC experienced financial difficulties' leading another party to bring an application it in liquidation. Hence the present claims.

[10] Each party claimed ownership based on a different mode of transfer and at a different time. MW claimed it had taken ownership by *constitutum possessorium* prior to Denise obtaining ownership by delivery. This because it contends CDC acquired ownership of the plane from the US parent and immediately passed ownership on to it, prior to the date of physical delivery to Denise. Thus, its case is based on prior right.

[11] Denise contends that ownership never passed to MW as the requirements of *constitutum possessorium* were never met. This is because on the 5th November CDC did not yet own, let alone possess, the plane – essential requirements for ownership to pass by *constitutum possessorium*. To get around this difficulty MW contends that notwithstanding the terms of the agreements, the passing of ownership by *constitutum possessorium* could be delayed – i.e., that it was understood that ownership would pass once CDC acquired ownership i.e., on the 6th, not the 5th, November. To lay a legal basis for this proposition MW relies on the judgment by Shearer J in *Boland Bank v Joseph and Another* where he held that ownership could validly pass by *constitutum possessorium* at some future date.[1] Put differently the transferor did not need to be in possession of the property at the time of the agreement.

[1] 1977 (2) SA 82 (D&C).

[12] This is the basis of the first ground of appeal - that I should have followed the approach of Shearer J in *Boland Bank*. As it is expressed in the notice of appeal:

> *"The court erred by failing to find that transfer of ownership in TTD could be delayed and could pass to the applicant upon CDC acquiring ownership in TTD [the plane]"*

[13] There are two problems with this approach. First on the facts. Nothing in the contracts which were prepared by MW says this. It states specifically the dates on which ownership would pass. To get around this problem MW argues that Denise, a third party, cannot rely on the terms of the contracts of others. But the case law for this proposition as I noted in my decision does not apply here. Second, even the conduct of the parties does not suggest any contemplation that the passing of ownership would take place later. On the contrary as I showed in my decision MW was of the view the aircraft was already in the country. It asked for a waiver of a landlord's lien and its attorney when first instructed contended that the plane was in the country on 5 November.

[14] Second, I have distinguished *Boland Bank* from the facts in this case - it is not the case that I have decided not to follow it. Third, I have followed an earlier case of *Kaplan* [2] on this point so there is no new law that might justify an appeal in terms of section 17(1)(a)(ii) of the Superior Court Act, because there are conflicting judgments on the matter under consideration.

[15] But the failure to comply with the elements of *constitutum possessorium* was not the only basis for the finding. The other is that the transaction was a simulated transaction. Here Denise argued that the real nature of the transaction was a loan and for which the plane was pledged as security. There was no genuine intention to pass ownership to MW. It was in essence a pledge and since MW never took possession of TTD, the pledge was ineffective.

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[2] *Kaplan v Messenger of Court, Port Alfred* 1932 EDL 281 at 294.

[16] Authority for this proposition comes from the case of *K&D Motors v Wessels* where the court held:

> *"But in deciding whether an agreement which purports to be a contract of sale is not a disguised contract of loan and pledge, it is certainly relevant to enquire whether the so-called purchaser requires the goods to be bought either for use or for resale, whether the seller wishes to dispose of the goods or whether the seller merely requires financial accommodation, which the purchaser is prepared temporarily to advance but not without some form of assurance of repayment other than the financial stability of the seller. If the latter is the case, and not the former, it is some indication that the transaction is one of loan and pledge."*[3]

[17] Here it was argued for Denise that the terms of the agreement state that the purpose of the financing was to enable CDC to purchase the plane. But this was contrived, argue Denise counsel. MW was fully aware that CDC did not require the funds to finance the purchase – MW was aware that CDC had already paid the US company for the plane. Thus, what they knew and what was stated in the agreements as the reason are at variance. This does not meet the test suggested in the cases for deciding whether a transaction is simulated which is to ask is there a *"genuine"* belief.

[18] From CDC's point of view, it could never have been a genuine transaction. Van Blerk was a fraudster after all, seeking to finance his business by way of selling the same aircraft twice. From the point of view of MW admittedly it was not aware of the prior sale to Denise. However, it was aware that this was a financial loan to fund his business not a loan to finance the purchase of the plane despite the language of the contract. It was argued by MW that to constitute simulation both parties must be party to the same form of misrepresentation. Thus most cases on

[3] 1949 (1) SA1 (A) p 13-14. This passage was cited with approval by Nienaber JA who wrote the minority judgement in a later case, *Bank of Windhoek v Rajie and another 1994(1)SA 115 (A) at pages 148 I-149 A.*

this point relate to attempts to evade taxes by simulating a change of ownership. This it was argued was not the case here.

[19] But even if this point of difference is arguable, MW has to succeed on both these points on appeal. It has to persuade an appeal court that there was a passing of ownership and that the transaction was not simulated. Success on one is insufficient. As counsel for Denise have argued the two issues are intertwined. Once the case for *constitutum possessorium* is weak on the facts, so it strengthens the opposing party's contention that the transaction is simulated.

[20] Finally, I deal with the last point in the notice of appeal, which is that I had applied the last opportunity rule. I neither used this terminology nor did I apply this doctrine without naming it. The point was not pursued in oral argument correctly so in my view.

[21] At best for it MW on the other two points it has an arguable case. But the courts have held that even if there is an arguable case on appeal this is not sufficient. This is best set out in the case of *MEC for Health, Eastern Cape v Mkhitha,*[4] where the Supreme Court of Appeal held:

> *"Once again it is necessary to say that leave to appeal, especially to this Court, must not be granted unless there is truly a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act, 10 of 2013 makes it clear that leave to appeal may only be given where the Judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard. ... A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal."*[5]

[4] [2016] ZASCA 176.
[5] Paragraphs 16-17.

[22] Applying that test to both grounds of appeal I conclude that there is no basis for granting leave to appeal. Nor am I persuaded that my decision creates uncertainty for the finance industry and that on this basis alone leave to appeal should be granted. My decision has not impacted on existing law. No uncertainty will be created.

ORDER:-

[23] In the result the following order is made:

1. The application is dismissed with costs of two counsel.

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N. MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHNANNESBURG

Appearances:

Counsel for the Applicant	R Stockwell SC
	AJ Venter

Instructed by:	Uys Matyeka Schwartz Attorneys
Counsel for the Respondent:	P Carstensen SC
	H Pretorius
Instructed by.	Edward Nathan Sonnenbergs Inc

Date of hearing (Virtually): 23 February 2023.

Judgment Reserved: 23 February 2023

Date of Judgment: 10 March 2023