

SOUTH AFRICA / JUDGMENT

Hellmann vs South African Civil Aviation Authority and Others (21/27401) [2023]

ZAGPJHC 29 (18 January 2023)

[2023] ZAGPJHC 29

COURT

South Gauteng High Court, Johannesburg

BEFORE

N Manoim

CASE / FILE NUMBER

21/27401

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FLYNOTES:

CONSTITUTUM POSSESSORIUM AND AN AIRPLANE
PROPERTY –
Ownership – Delivery – Competing claims for
ownership of aircraft – Delivery by constitutum possessorium
requiring that transferor
be the owner and in possession of the
relevant thing at the moment of transfer – Not shown in this
case and physical
delivery prevailing.
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
LOCAL DIVISION, JOHANNESBURG
CASE
NO: 21/27401

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: NO

REVISED: NO
18
January 2023
In

the matter between: DENISE
HELLMANN
Plaintiff
and
SOUTH
AFRICAN CIVIL AVIATION AUTHORITY First
Defendant
CDC
AVIATION (PTY) LIMITED (IN LIQUIDATION) Second
Defendant
MERCHANT
WEST (PTY) LIMITED Third
Defendant

JUDGMENT

MANOIM, J:

Summary: Law of property- Contending claims for ownership between party alleging earlier date for delivery by constitutum possessorium and other party by physical delivery. Sale date of one party prior to that of the other party but delivery date later. Abstract theory applied. Can ownership pass by constitutum possessorium if transferor not yet owner and possessor on date provided by contract. What must purchaser establish. Intention to pass ownership – tests to be applied.

Introduction

[1] On 23 November 2019, a brand new light aircraft known as a Cirrus SR22 G6 GTS landed at Lanseria airport just outside Johannesburg. The plane had just arrived in South Africa after a 10-day trip, with several stops on the way, from the home of its US manufacturer in Tennessee. Flying the plane was the plaintiff's son, Neil Hellman ("Neil"). Waiting excitedly for the arrival was the plaintiff and other members of her family of flying enthusiasts. Neil then handed the keys of the aircraft to the plaintiff, a former pilot but now her in eighties, no longer an aviator. A bottle of champagne was on hand. Also, with them at the airport to celebrate was Piet Van Blerk, the erstwhile chief executive and sole director of the second respondent, CDC Aviation (Pty) Ltd (in liquidation) ("CDC"). Whilst he is pictured toasting the arrival with

the happy family, he had a dark secret about this plane which he did not reveal to them, and they would only find out about much later.

- [2] Unbeknown to the plaintiff and her family, Van Blerk had sold the same aircraft just over two weeks earlier, to the third defendant, Merchant West (Pty) Ltd (“MW”) a finance house, in what is termed an asset backed financing transaction. Merchant West was unaware that Van Blerk had earlier sold the same plane to the plaintiff.
- [3] There is no dispute between the plaintiff and MW that each was defrauded by Van Blerk and both parties acted in good faith. What they do dispute is who is entitled to ownership of the plane. Van Blerk’s company CDC is now in liquidation, and the liquidator does not oppose either party’s relief.[1] The plaintiff, Denise Hellmann, who I will from now on refer to as Denise, is presently in possession of the aircraft.[2] She seeks the following relief:
- a. An order declaring that she is the owner of the Cirrus SR22 G6 GTS registered as [...](“the plane or TTD”);
 - b. An order directing the first defendant, the South African Civil Aviation Authority (“SACAA”) to issue a certificate of registration in her name for the plane;
 - c. Costs of suit.
- [4] MW opposes the relief and has brought a counter claim in which it seeks to be declared the owner of the plane and have the first defendant register it as such.
- [5] In essence both litigants claim ownership of the aircraft. I accept that both parties are innocent victims of a fraud perpetuated by CDC. This makes deciding the case more difficult because there is no claim to some principle of fairness that can decide the case in favour of one party over the other. Most of the facts in this case are common

cause. But they each rely on a different legal basis to assert their claims for ownership – the plaintiff on actual delivery and MW on a form of derivative acquisition of ownership known as *constitutum possessorium*. The latter is the case where the person transferring ownership retains possession of the thing but acknowledges that henceforth the transferee will own it.

The Hellmann case

- [6] The Hellmanns are a family with a passion for flying light aircraft. Mother, son, and grandson, all of whom who testified in the hearing, are pilots. Although Denise owns the plane, the whole family participates in decisions around the plane. In early 2019, the year all these events took place, Denise owned a Cirrus aircraft known by its registration number as BAJ. At the time she had an existing relationship with Van Blerk and CDC. She had purchased BAJ second hand from CDC in 2017. CDC was also responsible for performing certain services for Denise including looking after the aircraft whilst it remained in CDC’s hangars at Lanseria and leasing the aircraft out to other clients who wish to fly in it. In February

2019, Denise contacted Van Blerk to arrange a 10-year service for BAJ. Van Blerk persuaded her that servicing BAJ would not be

worthwhile, and he could get her a new plane using BAJ as a trade-in, at the original purchase price she had acquired it at.

[7] The Hellmann family agreed to the proposal. Van Blerk negotiated payment and service terms with Denise's grandson Christopher. At this stage the plane, later to be registered as TTD, was not yet in existence. Over the next few months, the Hellmann family planned its specifications which were to be customised by the manufacturer to suit them. In May 2019 CDC invoiced Denise for the plane. The purchase price was R 13 300 000.00 and Denise would get

R5 500 000 for the trade in of BAJ. The balance owing was R 7 800 000 and Denise paid this amount to CDC on 24 May

2019. Denise says although the invoice did not stipulate this it was agreed with Van Blerk that the plane was to be customised by Cirrus US to her specifications.

[8] On 28 May 2019, CDC entered into a sale agreement for the sale of TTD with Cirrus Corporation in the United States ("Cirrus US"). The purchase price was designated in US dollars - \$780 000. The

agreement reflects Cirrus US as the seller and CDC as the purchaser. There is no mention in the agreement of Denise or the fact that the plane had already been sold to a third party. This in itself would not have aroused suspicion as Cirrus US does not deal directly with customers in South Africa but only through its agent, then CDC. What the agreement does mention is that Cirrus US would build the aircraft to the customer's specification and would provide an acceptance flight of two hours with the purchaser or purchaser's representative. Delivery of the aircraft would be given to the customer FOB, at CDC's premises in Knoxville, Tennessee. Tony Forbes then an investor in CDC says he paid the final instalment over to Cirrus US on 28 October 2019.

[9] CDC then offered Denise the opportunity to send someone to accompany their pilot on what is termed the ferry flight. This was to be the flight the aircraft would undertake from Tennessee to South Africa. Denise agreed that her son Neil would accompany the pilots. On 4 November 2019, Neil arrived in Knoxville Tennessee. He underwent training on the aircraft for three days from 6 to 8 November. Importantly on 6 November 2019, Neil took delivery of the aircraft from Cirrus US. However, in doing so as the documentation at the time shows, he took delivery on behalf of CDC as the owner, not Denise. This is because the Cirrus US would only sell to its agent and not directly to the final customer. Van Blerk signed a power of attorney

authorising Neil to accept the plane on CDC's behalf. Included in the power of attorney was the right to inspect the plane. This function was thus given to Neil and not Tony Forbes, then a CDC employee, who was also on the trip.

[10] Neil and the others left Tennessee on 10 November 2019. He was accompanied amongst other by Tony Forbes. Flying with them in convoy were two other aircraft that had made the flight from the US. The flight took several days and eventually on 23rd November 2019 the

plane, with Neil in the pilot's seat, landed at Lanseria. Denise took physical delivery of the aircraft at that moment. Hence her claim of ownership by delivery on that date. On the same day, a fact relied on by MW, the aircraft was seized by customs officials until import duty was paid which it duly was. However as testified by Tony Forbes, there is nothing unusual about this procedure which according to him routinely happens when an aircraft arrives in the country. However, nothing much turns on this, as even if Denise only took delivery a few days later that does not alter the essential facts of this case.

- [11] Once the aircraft had arrived in South Africa the aircraft still registered in the United States needed to be registered in South Africa with the first respondent SACAA. Van Blerk had the aircraft registered in CDC's name not that of Denise. This was with her consent for reasons I explain later. He registered it as [...]at her request. The registration had some significance to her as TTD stood for "Thanks to Teddy" the name of her husband.
- [12] At this stage, the Hellmans' were unaware of MW's interest in TTD. In the meantime, they made use of the aircraft on several occasions. They did not pay for these flights since they considered that Denise owned TTD. It was only through the efforts of Tony Forbes that they became aware of the challenge to Denise's ownership. Forbes had bought BAJ (recall the aircraft Denise had owned and traded in as part of the purchase price to secure TTD) from CDC. He was anxious to have that aircraft registered in his name. By now he was no longer connected to CDC and had formed his own agency to serve Cirrus US. When CDC was unresponsive, he requested the registration certificate for BAJ from SACAA. He established that the

plane was co-registered in the name of CDC and Merchant West. Later in November 2020, he met with Armand Fourie from MW. He learned from Fourie that MW had co-registered its ownership of BAJ and registered a mortgage bond over it because of financing it had provided to CDC. But in that same conversation it emerged that CDC had also financed TTD.

- [13] Forbes then contacted Christopher Hellmann to tell him of the possible MW interest in TTD and advised him to register TTD in Denise's name. The SACAA has refused to do so given the dispute over ownership of which it had now become aware.

The MW case

- [14] MW's involvement in this case started with Shayne Wright. At that time, he was employed by MW as a sales manager. MW is a niche financing company and one of its specialities is financing sales of aircraft. Wright was introduced to Van Blerk by one of his seniors as someone well known in the aircraft industry. He did a prior deal with Van Blerk and CDC in respect of another aircraft with the registration number TJJ, which was structured as a sale and leaseback. But in addition, MW required that a mortgage be registered over BAJ. This type of arrangement is not unusual in the aircraft financing industry and has the added protection

[15] This was MW's prior history with CDC before Van Blerk approached it again for finance. Wright explains that initially Van Blerk wanted MW to provide financing for the purchase of the aircraft later to be known as TTD. On this basis MW would have paid Cirrus US directly. However, Wright says soon thereafter Van Blerk told him the aircraft had already been paid for, but he wanted to take out a loan for the value of the purchase price. The reason Van Blerk gave for seeking the financing was that he had acquired TTD to use as a demonstration model in order to sell other aircraft of the same type. Later according to what Van Blerk told Wright, he would sell TTD and use the proceeds to help repay the loan. Hence the financing was

required as MW understood it, not to purchase the asset but to help with working capital for the CDC business. Wright agreed to put in the necessary financing structure in place to meet this re-arranged transaction.

[17] CDC then entered into two agreements with MW. The first was a sale agreement in which CDC sold TTD to MW for R12 017 500.00. The second was an instalment agreement, providing for the sale of TTD by Merchant West to CDC for the price of R16 551 659 00. In terms of the latter agreement CDC would have five years to re-purchase the plane in monthly instalments whilst retaining the use of the plane. The plane would remain in CDC's possession. This arrangement of back to back agreements is fairly common in business. It is referred to as asset backed financing. Here the asset owned by the seller (CDC) is sold to the financier to enable to be sold back to it under an instalment plan.

[18] In terms of the sale agreement, it is specifically recorded that ownership will pass by means of *constitutum possessorium* and when that will happen. Thus Clause 7.1 states:

"It is recorded that [CDC] is currently in possession of [TTD]. [CDC] acknowledges and agrees that as from the Effective Date it will deliver [TTD] to Merchant West, by way of delivering an invoice setting out the description and purchase price to Merchant West, with the intention that Merchant West shall become and at all times remain the owner thereof, with ownership thereof passing to Merchant West by way of *constitutum possessorium*." [3] (My emphasis)

[19] The date for delivery and thus passing of ownership is the 'Effective Date.' This is defined in the agreement as the date of fulfilment or waiver of the suspensive condition in clause 4" [clause 2.1.4]" The suspensive condition being referred to, was the date on which CDC signed the instalment sale agreement. This date was 31 October

2019. There are however other later dates reflected on these agreements. For instance, there is reference to a "Delivery and Acceptance certificate" Here the date recorded is 4 November 2019.

[20] The terms of this certificate are significant, and I quote it in full:

"04 November 2019 in accordance with the provisions of the Sale Agreement made and entered into between Merchant West and the Seller, Seller [i.e., CDC] hereby accepts delivery of the Equipment [TTD] set out in the Invoice/s attached hereto and Seller does hereby confirm delivery of the Equipment to the addresses contained in the Equipment Schedule/s to the Master Instalment Sale Agreement. Furthermore, Seller confirms that the invoices (Annexure "B") has been delivered to Merchant West at 2nd Floor. 145 West Street,

Sandown, Sandton and agrees that as at and from the date of signature of the Certificate of Delivery and Acceptance in respect of the Equipment, Seller shall hold the Equipment with the intention that Merchant West shall become and at all times remain the owner thereof, with ownership passing to Merchant West by "constitutum possessorium". Merchant West hereby accepts delivery of the Equipment and invoice/s (Annexure "B" hereto) also forming part of the Master

Instalment Sale Agreement and subsequent Schedule 1 thereto entered into or to be entered into and certifies that same has been delivered in accordance with the provisions of the said Sale Agreement."

- [21] Van Blerk signed this certificate on behalf of CDC on 31 October at Lanseria. Wright is reflected as signing as a witness. MW signed it on 4th November 2019. On 5 November 2019 MW made payment of the purchase price for TTD in terms of the sale agreement.
- [22] As I discuss later, what crucially matters for transfer of ownership to take place by *constitutum possessorium* is the date on which delivery is to take place. *Ex facie* the documents whilst there are a number of possible dates for this to have taken place, ranging, from at its earliest, the 31st October 2019, (when CDC signs the instalment sale agreement) to the latest being the 5th November 2019, when MW made payment to CDC, they all precede the date on which CDC acquired ownership of TTD viz. 6th November 2019, when Neil took delivery in Tennessee, *ex facie* the document, on behalf of CDC. There is nothing in the contracts that suggests that *constitutum possessorium* would take place on a later date or was subject to a condition that it would take place once CDC had taken delivery from Cirrus US.

Van Blerk's conduct

- [23] Van Blerk via CDC almost succeeded in perpetrating his fraud because of certain unique features of the light aircraft industry with which he was well acquainted. Van Blerk enjoyed a good reputation as a professional agent amongst those in the industry. He was known to the Hellmann family from previous dealings. They trusted that he was a *bona fide* agent for Cirrus US and would carry out the sale and delivery of the aircraft on Denise's behalf. Thereafter he would manage the aircraft in the same way as he had previously managed BAJ, the Cirrus aircraft Denise had traded in to buy TTD. Management of the aircraft afforded additional opportunity for Van Blerk to disguise his fraud. He would be responsible for keeping TTD in CDC hangars. He was also contracted to hire out the aircraft for charter to third parties and manage the relationship with the SACAA. This afforded him the

opportunity to retain the fiction to both Denise and MW that they respectively owned TTD without either finding out about the existence of the other.

- [24] Likewise, MW representatives had previous dealings with him. Financing his transactions would not have seemed unusual. What further enabled him to escape earlier detection was that neither party wanted to register the aircraft in their own name. Both the Hellmanns and witnesses for MW indicated that they were reluctant to have to deal with the burden of compliance which includes inspections, if the aircraft was registered in their name.[4] They were content for CDC to assume this responsibility. This meant that CDC could remain the registered owner of TTD without attracting

suspicion from either party. Although as Wright explains the original deal with Van Blerk would have had MW purchase TTD directly from Cirrus US, Van Blerk changed this and said he had made payment already. This was a calculated move on his behalf. Denise's money had already been used to pay Cirrus US. Van Blerk wanted the payment in his own account since he had already secured payment to Cirrus US.

- [25] The preference for Cirrus US to deal only with its own agent also helped Van Blerk. This meant all paperwork was in the name of CDC, which he could provide to MW, without any trace of the Hellman payment or interest in the aircraft being revealed. When they specified colour preferences etc., they did not deal directly with Cirrus US but with CDC who then advised Cirrus US. Nor did the Hellmann family have any reason for suspicion. The use of Neil to collect the aircraft and join the convoy to bring it to South Africa, Van Blerk's attendance at the Lanseria ceremony when the plane arrived, all contributed to the illusion of normality – that Denise would acquire ownership once the plane landed at Lanseria. [5]
- [26] But perhaps the most significant was the fact that Van Blerk was almost able to get away with his fraud had he not had cash flow problems that led to a liquidation application in respect of another aircraft which MW found out about that finally exposed him.[6] As long as he kept up his instalments he would have, insofar as MW was concerned, resumed ownership of TTD. [7] As far as Denise was concerned, matters would have continued as they were until November 2024. The Hellmanns would have kept the plane hangered at Lanseria, CDC would have on occasion hired the aircraft to third parties. By then even if the Hellmann's had decided to register the plane in Denise's name this could have been accomplished – MW's interest would by then have been historic.

Summary of the essential facts

- [27] To summarise, the salient facts of the case are these. Denise entered into a sale agreement with CDC to purchase the aircraft which would later be registered as TTD. The invoice to Denise from CDC, dated 23 May 2019, reflects that the sale price as R 11 565 217.40. Part payment was made by way of the trade in of BAJ and the balance (7 800 000.01) was to be paid in cash. Denise paid the balance to CDC the following day on 24 May 2019. On 30 May 2019 US Cirrus invoiced CDC for the aircraft which would later become TTD. On the same day, an invoice from US Cirrus reflects receipt of payment and that a nil balance was owing

on the aircraft. All of these transactions preceded any contact that CDC had with MW regarding TTD.

- [28] Between 31 October and 4 November 2019, MW entered into two agreements with CDC in respect of TTD, unaware of the prior sale to Denise. In terms of the first, CDC sold TTD to MW. In terms of the second, MW leased TTD back to CDC. In terms of the agreements ownership passed by *constitutum possessorium* to MW by at the latest 5 November 2019. At that stage CDC did not own TTD. CDC only took ownership of TTD on 6 November 2019 through Neil acting as its agent when he collected the aircraft in the United States. On Neil's return to South Africa on 23 November 2019, he delivered the aircraft to Denise. She asserts ownership by delivery from this date.

Legal issues to be decided

- [29] The first legal issue in this case turns on whether MW acquired ownership of TTD from CDC, by delivery by *constitutum possessorium* on 5 November 2019, and thus prior to Denise, whose ownership claim depends on delivery that took place on 23 November 2019. Ordinarily a dispute over who is the owner of a movable property that a seller has sold to two different buyers would be resolved by preferring the claim of the buyer who first took delivery. This is the argument made on behalf of MW.
- [30] However, the contract of sale between Denise and CDC was concluded in May 2019 and thus prior to the sale between MW and CDC, concluded later that same year in October. The first issue is whether the prior sale to Denise gives her a stronger claim to ownership.
- [31] It is common cause that courts now follow the abstract as opposed to the causal theory in analysing transfers of ownership.[8] What distinguishes this theory from the causal theory is that it decouples the transfer of ownership from the contract underlying it. As Trengove AJA (as he was then) put it most succinctly in *Trust Bank v Trust Bank van Afrika Bpk v Western Bank Bpk en Andere NNO*:

“The validity of the transfer of ownership is independent of the validity of the underlying contract”[9]

- [32] This authority would seem to extinguish Denise's claim based on the prior sale. But counsel for Denise turned the application of the abstract theory around to argue that what must be looked at in this matter is whether on the relevant date MW had validly succeeded in acquiring ownership. They argue that MW did not. They say so for two

reasons.

Firstly, that the requirements for transfer of ownership by *constitutum possessorium* were not met; and secondly, that even if they were, the CDC/Merchant West agreement was a simulated transaction. I deal with each of these arguments in turn.

Constitutum possessorium

[33] The requirements for delivery by *constitutum possessorium* are well known. They are:

- a. The transferor (in this case CDC) must be the owner and in possession of the relevant thing at the moment of transfer;
- b. The transferor must cease to possess in his own name and begin to possess for the transferee (in this case MW);
- c. The transferee must consent that the transferor retains possession;
- d. There must be a clearly proved contractual relationship or *causa detentionis* under which the transferor become the detentor for the purchaser.[10] By this is meant according to Silverberg "...the reason for the transferor's continued physical control." (My emphasis)

[34] Counsel for Denise argued that on the common cause facts the first requirement has not been met. If the date of transfer is taken at the latest most favourable date to MW, then it would have been the 5th November 2019. But on that date CDC was still not the owner of TTD nor did it have possession of it. Indeed, TTD was then still in the United States owned by Cirrus US. It was only on the following day that Neil got possession of TTD in the United States

[35] To meet this problem of the 5th November, counsel for MW raised two issues. The first was that Denise could not rely on the terms of a contract to which she was not party. Put differently as a third party she could not hold the parties to the date of the 5th November for the passing of ownership to take place. Authority for this proposition was the case of *Aussenkehr Farms (Pty) Ltd v Trio Transport CC* [11] where Lewis AJA explained the position in this way:

"Where the parties dispute the meaning of a term then a court must necessarily look to the wording of the provision itself to determine

its correct construction. But where they agree on its meaning, even though the provision appears objectively to reflect a different

understanding, it would be absurd to insist on binding them to a term upon which neither agrees only because of a third party' insistence on reliance on the apparent meaning of the provision."

[36] But as counsel for Denise argued that case has no application to the facts of this case. This is not a case where Denise is contending for a meaning for the contracts that neither of the contracting parties are. Since no one testified for CDC in this matter it is not open to MW to have the contracts terms interpreted in any way other than they are written. In these circumstances Denise is entitled to rely on the terms of the agreements. This argument does not assist MW.

[37] The second argument was that CDC did not have to be the owner at the time the transfer of ownership was made, as long as CDC acquired ownership of TTD later that suffices. Thus, on this basis MW acquired ownership once the plane had been delivered to CDC through Neil, albeit as its unwitting agent, on 6 November 2019. This was prior to the physical delivery to Denise on 23 November.

[38] There is nothing in the agreements that provides for this later possibility. This was not the case made out by MW in terms of its original plea. However, an amended plea filed in March 2022 gives rise to two possible interpretations. In terms of paragraph 11.2 the facts pleaded appear consistent with the language of the contracts:

“On or about 5 November 2019 and at Johannesburg the second defendant, duly represented by Mr Van Blerk, and the third defendant, duly represented by Mr Rush, entered into a written instalment sale agreement in terms whereof the third defendant sold TTD back to the second defendant, whilst retaining ownership of TTD until the full purchase price had been paid.”

[39] But in the next paragraph of the plea MW appears to anticipate its later difficulties around delivery and states the following:

“Upon conclusion of the aforesaid sale and instalment sale agreement the second and third defendants agreed that upon CDC taking delivery of TTD, the third defendant would become the owner of TTD. It was further agreed that the second defendant would be entitled to retain possession of TTD and make use of the aircraft for purposes of its business, but subject to the third defendant's ownership in and to TTD.”[12]

[40] Notwithstanding the content of the earlier paragraph in the plea I will accept for MW's benefit that in the latter paragraph, as the underlined portions indicate, MW has at least pleaded the case it now seeks to rely on. But it is far from clear that this was MW's understanding at the relevant time. On the contrary it appears from the contemporaneous correspondence that MW believed that TTD was already in the country. This much is clear from an email exchange between Rene Madrimathoo, a sales support officer for MW, and Alex Smith, the chief flight instructor at CDC. Madrimathoo wrote to Smith on 4th November the following email:

“We are the finance house for CDC Aviation (Pty) Ltd. I called Lanseria International Airport and they advised me that you are in charge of Hanger 24 Gate 5 Lanseria International Airport. I have attached the landlord waiver of the assets that we have financed, to be signed by yourself. Once signed, please forward it back to me.”

[41] It is unlikely that MW would have sent a request of this nature on 4th November, initially to Lanseria and then to CDC, unless it was under the impression that TTD was already in South Africa. Landlords are not asked for waivers in respect of property that is not on their premises. The landlord's waiver form was then sent back to the MW on the same day, signed by Smith, but not it seems without some initial surprise about the request on his behalf.[13] This assurance must have satisfied MW because on the following day, 5 November 2019, it

made payment in terms of the sale agreement to CDC.

- [42] The waiver form, a pre-printed document, presumably used routinely by MW, contains the following statement:

“Please note that the goods described below [TTD’s particulars are described] are the property of Merchant West and may not become the subject of any lien, hypothec for any reason whatsoever and or may they be encumbered in any way.”

- [43] It is not clear why MW sought a landlord’s waiver from the same party which was selling it the aircraft. To the extent that it was seeking some third party assurance about the plane this was not likely to be effective, nor, as time would tell, was it. Had MW followed up with Lanseria not CDC, it would have ascertained that the plane was not at Lanseria and indeed not even in the country at the date they paid for it, 5 November 2019.

- [45] Instead, MW went through an elaborate but ineffectual paper trail of verification; requesting the type of documentation all of which Van Blerk could easily provide e.g., the contract with US Cirrus, the proof of payment and insurance, none of which revealed the presence of Denise. But importantly if this was to be transfer through delivery by way of constitutum possessorium, CDC was not required to prove that it was in possession of the plane at the moment of transfer, although MW must have been aware that the sale by Cirrus US was as recent as October. Nor was there any curiosity about the fact that CDC had managed to pay for the plane in October, apparently from its own resources, but was now seeking funding for the value of the purchase price a month later. Granted not an obvious sign of fraud but an unusual transaction that should have put those in the bank on the alert. At least one person from MW raised a query. In an email to Wright dated 21 October 2019, Angela Craul, MW’s Head of Sales Support, congratulates him on getting approval for the CDC transaction, but then asks about getting a bond over the aircraft, but does not press the issue, ending with an attempt at humour “...or have I missed the plane completely”

- [46] Even after MW became aware of the contending claim of Denise its attorney did not contend that the delivery was meant to take place on some later date. It was clear that he was under the impression that the plane had arrived in South Africa on 5 November 2019. This is evident from a letter dated 15 January 2021 that MW’s attorney wrote to the SACAA to seek an undertaking that the TTD would not be registered into the name of a third party (presumably a reference to Denise). The attorney wrote:

“We herewith confirm that the said aircraft with the aforesaid particulars as set out above, is currently the subject of impending

litigation between the parties and that our offices have been advised that the aircraft stands to be registered into the name of an entity/person/third person, who is not our client, as our client is the lawful owner of the said aircraft since its arrival here in South Africa from the USA on 5 November 2019.” (My emphasis)

[47] The date is significant. This is the same date on which delivery is said to have taken place in terms of the agreements, and the date on which MW made payment of the money to CCD. All this points to the fact that CDC had intended ownership by constitutum possessorium to take place on that date and not any later date. Why would MW, an experienced financier advance payment to be secured by an asset not yet in the country? There was no urgency for payment given that CDC had already paid for the plane.

[48] The reason the date is significant in law arises from the following cases. In the earlier, *Kaplan v. Messenger of Court, Port Alfred, Graham, J.P.*, stated:

"It is quite clear, however, that the person who desires to deliver the article by a constitutum possessorium must at the date of the transaction have the dominium in the article he desires to deliver, and not merely be a detentor or custodian.[14]

[49] But in a later case, *Boland Bank v Joseph and Another*, Shearer J took a different view. He referred to Kaplan's case but distinguished it on the basis that in that case:

"(...) the learned Judge was concerned with the question of whether dominium passed then and there. The question before me is, as I conceive it, whether rights short of ownership can pass by a constitutum possessorium, which are thereafter converted into ownership in the event of the condition precedent to the deliveror becoming owner being fulfilled."

[50] The facts of this case are closer to a Kaplan "then and there" case than a Boland Bank 'thereafter' case. This is borne out not only by the express terms of the agreement insofar as they relate to the passing of dominium, but also the understanding of MW at the time as evidenced by the attorney's letter and as I have shown the logic of the transaction.

[51] I am satisfied that on these facts MW has not established that it acquired ownership of TTD by constitutum possessorium on the relevant date which was the date of the transaction because on that date CDC was not the owner of the plane. Neither the agreements nor the facts, provided for delivery at some later date that delivery would take place once CDC had become the owner. Instead, I find that Denise acquired ownership by delivery on the 23 November 2019 when TTD arrived at Lanseria, and she was there to collect it.

Simulated transaction.

[52] Even if I am wrong on this point there is also an argument made by Denise's counsel that the transactions between CDC and MW constituted a simulated transaction. Courts have held that where an ostensible transfer of ownership is merely a form of pledge it will be regarded as a simulated transaction.

[53] What is crucial here is the intention of the parties. As was held by Innes CJ in *Goldinger's Trustee v Whitelaw and Son*[15]

"A consideration of all the circumstances fails to satisfy me that the claim of Whitelaw & Son can be supported. The conclusion to which I am led on the whole evidence is that the object of the parties was to secure the claim of the respondents by giving them a real charge upon the wagons, while at the same

time allowing Goldinger to deal with them as before, but to account for them as he succeeded in disposing of them. The transaction was in essence, therefore, not a sale but a pledge. No doubt the parties thought that by going through the form of a sale they could secure the benefits of a pledge. But in that they were mistaken. The doctrine constitutum possessorium, though it may in certain cases have the same effect as actual

delivery, can have no operation to validate a pledge where the pledged article remains in the possession of the pledgor under such

circumstances as are present here.”[16]

[54] Moreover, as the court held in *Vasco Dry Cleaners v Twycross* it is the intention of both parties.

“In order successfully to resist the plaintiff's claim it was not necessary for the defendant to establish on a balance of probabilities that the contract relied upon by the plaintiff was a negotium simulatum. In order to obtain judgment against the defendant it was necessary for the plaintiff to establish on a balance of probabilities that the contract was a genuine contract of sale; and more particularly that in the matter of the transfer of ownership there existed the concurrence and intention of both contracting parties.”[17] (My emphasis)

[55] In *ABSA Bank Ltd t/a Bankfin v Jordashe Auto CC*[18] the court whilst not deciding the matter on the point of constitutum possessorium nevertheless made a remark apposite to the issue of whether there was simulation in the agreements between MW and CDC. The court noted that the one of the requirements for the passing of ownership was that the seller (in this case CDC) intended to pass ownership. In that case one Marais was the equivalent of Van Blerk in this case. The court noted the following about him:

“Whether the third requirement [i.e., the seller intended to pass ownership] is satisfied depends largely upon whether Jordashe’s version of the contract reserving ownership and its ignorance of the existence of the floor plan until 4 November 1999 is accepted. If it is, then Marais could never have intended to pass ownership because he knew he could not.”

[56] It is a reasonable inference from the facts of this case that Van Blerk never intended to transfer ownership of TTD to MW because in the language of Jordashe ‘... he knew he could not.’ He did seek to transfer ownership to Denise. This is why notwithstanding the agreements with MW in late October and early

November, he gave Neil a power of attorney on 5 November 2019, to take delivery of the plane including the significant right of

inspection. If he intended to own for CDC, he would not have given up on such a crucial right. Forbes was there and could have attended to this function.

[57] Moreover, he was present at Lanseria on 23rd November to deliver TTD to Denise. What he sought to do was to use the asset to gain temporary cash flow until the money advanced could be repaid to MW. As I observed earlier, he almost got away with it. The duration of the

instalment sale agreement was five years.[19] After that ownership would, nominally at least, 'revert' to Van Blerk. For nearly a year of the five year instalment sale he had with MW, neither Denise nor MW were aware of the fraud. Had he paid off the instalments no-one would have been any the wiser. Denise would have continued to believe she had clean title to the plane and was not in a hurry to register it into her name. MW had no need as long as instalments were paid to make any further enquiries.

- [58] A more general approach to intention in ownership disputes has also been given attention by the Constitutional Court. In *Van der Merwe and Another v Taylor N.O. and Others*. [20] Mokgoro J remarked that: "The requirement of intention as the mental element which must be established by evidence derived from the circumstances of each case." She then cited with approval an earlier decision by Van der Westhuizen AJ in the case of *Unimark Distributors Pty Ltd v Erf 94 Silvertondale Pty Ltd* [21] where he stated:

"It would still seem as if cases are to be decided on their own facts and that common sense and reasonableness play a prominent role. As stated in Secretary for Inland Revenue v Charkay Properties (Pty) Ltd 1976

- (4) SA 872 (A) at 875H, it is first necessary to think one's way through the facts of a case, before turning to 'tests'...No clear answers are to be found if Court judgments are examined in a casuistic way."

- [59] I cite these cases of broad principle because although there are a number of cases in which disputed claims have resulted in the party contending for delivery by *constitutum possessorium* have prevailed, each turns on its own peculiar facts and none are precisely on all fours with the present matter. Comparing or contrasting all would be an exercise in futility. As Wallis JA observed in *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC and Others* 2014 (4) SA 319 (SCA):

"There is a plethora of cases dealing with transactions capable of being regarded as simulated and also containing reservation-of-ownership

clauses, such as.... On the view that I take, that it all depends on the facts of each case — it will not be necessary to compare and contrast all these cases. Some of them have facts which are distinguishable from the present case."

- [60] The invocation by Van der Westhuizen AJ that common sense and reasonableness must play a prominent role also leans toward favouring the ownership claim of Denise.
- [61] Finally, it is important to bear in mind that courts have treated claims for ownership passing by *constitutum possessorium* strictly, precisely because of the potential for fraud to take place as it did in this case. As Silverberg points out:

“This mode of delivery obviously provides a ready opportunity for a debtor to defraud his or her creditors or for third parties generally to be deceived, and for this reason the courts 'have always narrowly scrutinised its application'. In Goldinger's Trustee v Whitelaw & Sons Innes CJ laid down the safeguard that constitutum possessorium is never presumed. The party alleging it must establish facts from which its existence clearly and necessarily follows.”[22]

- [62] It must follow then that even an innocent contracting party, in this case MW, needs to take care to establish the facts prior to accepting delivery in this form. In this case it failed to do so. It failed to establish that CDC was either the owner or possessor of the aircraft on the day in question when delivery by constitutum possessorium was to have taken place.

Conclusion

- [63] For the reasons set out above I find that ownership of TTD did not pass to MW on 5 November 2019 or any later date. Rather, Denise has established that ownership of TTD passed to her by delivery on 23 November 2019, when the plane arrived at Lanseria. This means that her claim as the plaintiff must succeed and the counterclaim by the third defendant must be dismissed.

Costs

- [64] No special award of costs is required in this case and the costs must follow the result including the costs of two counsel. Both parties had made use of the services of two counsel.

ORDER: -

- [65] In the result the following order is made:

1. It is declared that the plaintiff (Denise Hellmann) is the owner of the Cirrus SR22 G6 GTS registered as [...] (“the plane or TTD”);
2. The first defendant, the South African Civil Aviation Authority, is directed to issue a certificate of registration in her name for the plane;
3. The third defendants counterclaim is dismissed.
4. The third defendant is liable for –
 - a. The plaintiff’s costs of her suit; and
 - b. The plaintiff’s costs in opposing the counterclaim.
5. Both sets of costs are to include the costs of two counsel one of whom is a senior counsel.

N. MANOIM

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

JOHNANNESBURG

Appearances:

Counsel for the Plaintiff: P Carstensen SC

H Pretorius

Instructed by. Edward Nathan Sonnenbergs Inc

Counsel for the Third Defendant R Stockwell SC

AJ Venter

Instructed by:

Uys Matyeka Schwartz Attorneys

Date of hearing (Virtually): 15,16,17,18, 19 August 2022 and 16 September 2022.

Judgment

Reserved:

16 September 2022

Date of Judgment:

18 January 2023

[1] The first defendant the South African Civil Aviation authority gave notice of intention to abide.

[2] The convention of referring to the plaintiff by her first name was adopted by the parties during the trial as this was to avoid

confusion as three members of the Hellmann family testified.

[3] For ease of understanding, I have replaced the term ‘seller’ in the agreement with CDC and the term ‘equipment’ with TTD hence the square brackets.

[4] Thomas Kruger the head of credit at MW puts this most strongly when he says, “Registering an aircraft in the name of Merchant West is not an option.” (See case lines 031-205) He goes on to explain that aircraft registration unlike vehicle registration does not make allowance for dual registration. In vehicle registration, one can be registered as a title holder as well as an owner. Aircraft registration only allows registration as owners, and then imposes duties and liabilities on owners considered onerous. An option would be to register a mortgage something MW seemed to have considered but not persisted with.

[5] A letter written by Denise' attorney to the SACAA on 21 January 2021 may suggest that the original belief was that delivery had taken place when Neil collected the plane on 6 November in the US. (Case Lines 024-105) This phrasing may be open to another

interpretation as it is correct that Neil took delivery but at that stage, as the documentation shows, it was on behalf of CDC. However, the pleaded case is that Denise took ownership by delivery on 23 November 2019 when the plane landed at Lanseria. See particulars of claim paragraph 25.

[6] See Wright witness statement paragraph 22. Case Lines 031-270.

[7] It was to commence on 4 November 2019 and to expire on 1 November 2024. (See Schedule to Instalment sale agreement case lines page 025-424.)

[8] For a more recent authority see Mckenna Inc and Another v Shea and Others 2010

(1) SA 35 (SCA) at paragraph 20 where the court held that: "With regard to the transfer of movables our courts, including this court, have long ago opted for the abstract theory in preference to the causal theory (see e.g. Commissioner of Customs and Excise v Randles, Brothers & Hudson Ltd 1941 AD 369 at 398 - 399; Dreyer and Another NNO v AXZS Industries (Pty) Ltd D 2006 (5) SA 548 (SCA) ([2006] 3 All SA 219) in para 17).

[9] 1978

(4) SA 281 (A) (at 301H to 302A as translated into English by Silberberg)

[10] Silberberg, The Law of Property 5th Edition, pages 188-189.

[11] 2002(4) SA 483 (SCA)

[12] Paragraph 11.3

[13] Smith was not in on the subterfuge, perpetrated by Van Blerk. His evident surprise is expressed in an email he forwarded to a

colleague at CDC, Carole Laity, where he says: "I received this. Doesn't make sense to me."

[13] Laity replies that she will deal with it. There is nothing in the record to show whether she did. But an hour later Smith then signs the landlord waiver on behalf of CDC, and this is sent back to MW with Van Blerk copied in. The reason for Smith's surprise is that he was well aware of the prior sale to Denise having been the person at CDC responsible for sending her specifications to Cirrus US.

[14] 1932 E.D.L. 281 at p. 294.

[15] 1917 AD 66

[16] Supra, pages 78-79.

[17] 1979 (1) SA 603 (A) at 621.

[18]

[2003] 1 All SA 401 (SCA)

[19] It was to commence on 4 November 2019 and to expire on 1 November 2024. (See Schedule to Instalment sale agreement case lines page 025-424.)

[20] 2008 (1) SA 1 (CC) at paragraph 44.

[21] 1999 (2) SA 986 (T) at page 1000.

[22] See Silverberg op cit., page 189.

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