IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISON, PRETORIA)

CASE NO.: 79946/2019

1) REPORTABLE: ~~Yes~~/No

(2) OF INTEREST TO OTHER JUDGES: ~~Yes~~/No

(3) REVISED: Yes

_____ ___24/2/2021_____

Signature Date

In the matter between:

STARLITE AVIATION TRAINING ACADEMY (PTY) LTD (Registration Number: 2006/015328/07)	**APPLICANT**
And	
GRADCO SOUTH AFRICA (PTY) LTD (Registration Number: 1999/026872/07)	**FIRST RESPONDENT**
DAVID MOUTON (Identity number: [….])	**SECOND RESPONDENT**

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JUDGMENT ON THE APPICATION FOR LEAVE TO APPEAL

SARDIWALLA, J:

Introduction[1]

[1] This is an application for leave to appeal in terms of section 17(2)(b) and 17(1)(a)(i) of the Superior Courts Act 10 of 2013 against the whole order brought by the applicant (the second respondent in the urgent application), in terms of which the removal of the helicopter was ordered against the applicant. The background is the following.

[2] On 6 December 2019, an application was before me in the urgent court brought by the first respondent against the applicant being essentially that the applicant hand over to the first respondent a certain helicopter. On even date I granted the relief that the first respondent had sought as follows:-

1. The second respondent is ordered to make the McDonnel Douglas 520N helicopter with registration letters ZT_RFL available to the applicant immediately, so as to enable the applicant to remove the helicopter from the second respondents (Hanger A21) situated at Rooikat Street, Aalwyndal, Mossel Bay, Western Cape Province.
2. The applicant is directed to remove the helicopter from the premises referred to in paragraph 1 supra, at a date and time to be

[1] *In the interest of brevity evidence led before the court a quo will not be repeated in this judgment in any great detail unless material to the conclusions reached. Readers of this judgment are referred to the judgment of the court a quo and the record if any additional details are required. To facilitate reading, the same terminology as adopted in the court a quo will be followed to ensure consistency and hopefully ease of understanding.*

arranged with the second respondent and the applicant assumes responsibility to arrange for transport (a low bed) to remove the helicopter and to transport the helicopter at its own cost and risk from Mossel Bay to Wonderboom Airport, Pretoria, Gauteng.

3. The helicopter will be inspected at the second respondents' hanger, referred to in paragraph 1 supra, by the Authorised Maintenance Organization (AMO) represented by Mr Black Swart of Helifix CC, who will inspect the helicopter prior to its removal from the second respondents' hangar,

4. In the event that the second respondent omits or refuses to comply with the order referred to in paragraph 1 supra, the Sheriff of this Court and /or his/her Deputy is authorised and mandated to attach the helicopter and to remove it from the second respondents' possession and to deliver the helicopter to the applicant *ante omnia*; and

5. The costs are reserved.

[3] As a consequence the applicant has brought an application for leave to appeal seeking leave to appeal to the Full Court of the Gauteng Division of the High Court against the entire order. The appeal was before me on 19 August 2020 which I refused with costs. The reasons for my refusal of the application for leave to appeal are dealt with below.

First Respondent's grounds of appeal

[4] The applicant disputes my findings, in that it disputes that the first respondent was entitled to the relief granted. The applicant's grounds of appeal in essence are: -

1. The *court a quo* lacked jurisdiction;
2. The applicant had a *lien* over the helicopter which entitled the applicant to retain the helicopter;
3. There is a reasonable prospect that another court may come to a different conclusion.

[5] With that background it is appropriate now to consider Section 17(1) of the Superior Courts Act 10 of 2013,which provides the test for an appeal as follows:

4. *"(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-*
5. *(a)*
6. *(i) the appeal would have a reasonable prospect of success; or*
7. *(ii) there is some other compelling reason why the appeal should be heard..."*

[6] In considering the provisions of s 17(1)*(a)*(ii) of the Superior Courts Act which provide that leave to appeal may be granted, notwithstanding the Court's view of the prospects of success, where there are nonetheless compelling reasons why an appeal should be heard. There is established jurisprudence in this Court that where an appeal has become moot the Court has a discretion to hear and dispose of it on its merits.

[7] The merits of the appeal remain vitally important and will often be decisive. Furthermore, where the purpose of the appeal is to raise fresh arguments that have not been canvassed previously before the Court, consideration must be given to whether the interests of justice favour the grant of leave to appeal. It has frequently been said by the Constitutional Court that it is undesirable for it as the highest court of appeal in South Africa to be asked to decide legal issues as a court of both first and last instance. That is equally true of this Court. But there is another consideration. It is that if a point of law emerges from the undisputed facts before the court it is undesirable that the case be determined without considering that point of law. The reason is that it may lead to the case being decided on the basis of a legal error on the part of one of the parties in failing to identify and raise the point at an appropriate earlier stage.[2] But

[2] *Van Rensburg v Van Rensburg & andere 1963 (1) SA 505 (A) at 510 A-C. The approach has been endorsed by the Constitutional Court. CUSA v Tao Ying Metal Industries & others (CCT 40/07) [2008] ZACC 15; 2009 (2) SA 204 (CC) para 68.*

the court must be satisfied that the point truly emerges on the papers, that the facts relevant to the legal point have been fully canvassed and that no prejudice will be occasioned to the other parties by permitting the point to be raised and argued.[3]

[8] The grounds of appeal as a whole are novel. Having said that, the applicants' challenge on the Court's factual findings are firstly, that the first respondent's cause of action was merely *rei vindicatio* and nothing more. Secondly, the first respondent had made no mention of an oral agreement which led to the applicant being in possession of the helicopter and as such did not plead this in its founding affidavit. Lastly that the sole basis upon which the first respondent alleged that this Court had jurisdiction was that the helicopter was in the possession of the applicant "located at a place or venue situated within this Court's area of jurisdiction". The applicant submitted that this Court should have determined the first respondent's application with reference to its pleaded case in the founding affidavit having regard to its pleaded cause of action and the applicant and second respondents' answering affidavit with regard to the physical location of the helicopter. It submits that the court erred by completely ignoring the fact that the first respondent did not deliver a replying affidavit in the urgent application and therefore as a result did not

[3] *Fischer & another v Ramahlele & others (203/2014) [2014] ZASCA 88; 2014 (4) SA 614 (SCA) paras 13 and 14.*

dispute the applicant's allegation that the helicopter was situated at the applicant's hangar situated at 69 Rooikat Street, Aalwyndal, Mossel bay (Hangar A21). Further that the answering affidavit by the second respondent which it noted did not oppose the first respondent's urgent application was unbeknown to the applicant as it was not served on its attorneys. It further submitted that in any event the second respondent's referral to the premises of the applicant in his answering affidavit could only have been the premises of the applicant at its hangar in Mossel bay because the first and second respondent knew from February 2019 that the helicopter was in the hangar in Mossel Bay.

[9] I accept that the general rule is that a party must make out its case in the founding affidavit. It cannot do so in reply, however this is not an absolute rule. Courts have been cautioned not to be overtly technical in such matters. The following was said about the approach to be adopted by our courts in *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA) at page 955 at paragraph [15]:

"In South African Milling (at 436 -437C) the matter was also approached from a procedural point, namely that a party is not entitled to make out a case in reply and that a ratification relied upon in reply infringes this rule, this part of the ratio is strictly speaking not apposite to the present case because the issue here was decided upon a stated

case which did not raise this point. It remains, however, in view of persistent difficulties in this regard, necessary to emphasise that this Court in Moosa and Cassim NNO has clearly adopted as correct refutation in Baeck & Co (at l l 4E - l 19B) of the approach and to state that !fully subscribe to that view. The rule against new matter in reply is not absolute (cf Juta & Co Ltd and Others v De Koker and Others 1994 (3) SA 499 (I') 1994 at 511F) and should be applied with a fair measure of common sense. For instance, in the present case, the point provided no material or substantial advantage to Smith -at least, counsel could not point to any - and it simply at great cost postponed the day of possible reckoning (cf Merlin Gerin at 6601- J; National Co-op Dairies Ltd v SMITH 1996(2) SA 717 (N) at 719 E- F".

[10] The following was said in Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd 2007 (2) SA 363 (SCA) at paragraph 32:

"I am not entirely sure what is meant by the description of the application as 'totally irregular'. If it is intended to convey that the application amounted to a deviation from the Uniform Court Rules, the answer is, in my view, that, as often been said, the rules are there for the Court, and not the Court for the rules. The Court a quo obviously has a discretion to allow the affidavit. In exercising this discretion, the overriding factor that ought to have

been considered was the question of prejudice. The perceived prejudice that the respondent would suffer if the application were to be upheld, is not explained. Apart from being deprived of the opportunity to raise technical objections, I can see no prejudice that the respondent would have suffered at all. At the time of the substantive application the respondent had already responded in its replying affidavit. The procedure which the appellant proposed would have cured the technical defects of which respondent complained, the respondent could not both complain that certain matter was objectionable and at the same time resist steps to remove the basis of the complaint. The appellant's only alternative would have been to withdraw its application, pay the wasted costs and bring it again supplemented by the new matter. This would result in a pointless waste of time and costs. For these reasons the applicant's substantive application to supplement its founding affidavit should, in my view, have succeeded. "

[11] The following was also said in Lagoon Beach Hotel (Pty) Ltd v Lehane NO and Others 2016 (3) SA 143 (SCA) at paragraph [16]:

"Then there is the fact that a voluminous replying affidavit containing a great deal of evidential material relevant to the issues at hand had been filed. Relying upon authorities such as

Sooliman, the appellant argued that it was 'axiomatic ... that a reply is not a place to amplify; the applicant's case ' and that the new matter has been impermissibly raised by Lehane in reply, that it was evidential material to which the appellant had not been able to respond, and that it fell to be ignored. However, again, practical common sense must be used, and it is not without significance that many of the hearsay allegations complained of were admitted by the appellant in its answering affidavit. And although Lehane had been appointed the official assignee to Dunne's estate some 13 months before the application was launched in the court a quo, and the information set out in reply could therefore have been contained in the founding affidavits, sight must not be lost of the fact that the application was initially launched by Lehane's deputy official, Mr D Ryan, in the absence of Lehane who was abroad at the time and unable to depose to an affidavit. The detailed allegations made by Lehane speak of he, and not Ryan, having been more au fait with the facts and circumstances of the matter. Moreover, the initial application was moved as a matter of urgency, and the courts are commonly sympathetic to an applicant in those circumstances, and often allow papers to be amplified in reply as a result, subject of course to the right of a respondent to file further answering papers.

Regard should also be had to the intricacy of Mr Dunne's dealings that required intensive and ongoing investigations. Furthermore, the appellant, as respondent a quo, did not seek to avail itself to the opportunity to deal with the additional matter Lehane set out in reply, and I see no reason why these allegations should therefore be ignored "

[12] Having adequate consideration of the answering affidavits and the oral evidence that was led before this Court I concluded that this Court had the necessary jurisdiction by the ground of *ratio contractu* raised by the second respondent in his answering affidavit in the urgent application. I may have overlooked that this ground was in fact raised by the second respondent and not the first respondent, however argument was led by both parties which related to the agreement. The applicant who interestingly did not deny the existence of the agreement however stated that it was between the applicant and the second respondent. It also agreed that the agreement was signed in Wonderbroom and Middleburg. It was on that basis that this Court found that it had jurisdiction. This Court was of the view that to disregard this evidence merely because it was not raised by the first respondent would not be in the interests of justice and would only serve to postpone the day of reckoning for the applicant. It is clear from the aforegoing precedent although it differs

somewhat in that it deals with new material raised in replying affidavit and whether same should be considered the principle is nevertheless the same. In any event applying the approach of the Courts above even if the first respondent filed a replying affidavit mentioned the basis of which the applicant came to be in possession of the helicopter the Court would still be required to consider it. The fact of the matter is that a point of law had emerged on the papers and was not disputed by any of the parties including the applicant therefore it would serve no justice for this Court to adopt a technical approach that would result in wasted time and costs. Rather a common sense approach should be used when dealing with such matters. The true test is whether all the facts pertaining to the matter have been placed before the court. If there is any prejudice, that prejudice must be brought to the attention of the court. A party that is prejudiced should be allowed to file a further affidavit that deals with that point. The applicant did not request to file a further affidavit but was afforded an opportunity in oral evidence to respond to the second respondents' allegations which took care of any prejudice that the respondent may have suffered. It cannot complain later after they were afforded an opportunity to respond to any new matters.

[13] The second basis upon which the Court relied to confirm its jurisdiction was the second respondent's (first respondent in the urgent application) answering affidavit in which he stated at paragraph 17 that,

> *"On 8 November 2019 I attended the premises of the 2nd respondent to ascertain where the applicant's helicopter was situated. I found the helicopter at the 2nd respondents' premises and inspected same."*

However, the applicant contends that the referral of the premises of the second respondent in the first respondents' answering affidavit could only have been the premises of the applicant in Mossel bay but failed demonstrate how it arrived at that conclusion. Upon consideration of the second respondents' answering affidavit the Court found that the he only ever made mention of the Wonderbroom Airport in preceding paragraphs to paragraph 17 and therefore in the premises could only be interpreted to mean that the premises to which he referred and attended to ascertain where the helicopter was situated was that of Wonderbroom Airport. No reference at all is made of Mossel Bay. The second respondent also attached images of the damages to the helicopter. Considering that the second respondent substantiated the claim of the first respondent in the urgent application and the absence of evidence on behalf of the applicant that the helicopter was stationed in Mossel Bay the Court accepted the evidence of the second respondent and found that this Court had the

necessary jurisdiction on the ground of *ratio contractu* to determine the dispute.

[14] The last ground of appeal relates to the lien in which the applicant submits that in the absence of the first respondent filing a replying affidavit disputing that it incurred costs which costs were not merely a storage lien but an improvement lien this Court should have found that the applicant was entitled to retain possession of the helicopter as the first respondent simply left the helicopter in its possession. The applicant is clearly misdirected as the filing of replying affidavit is not a compulsory requirement but rather a prerogative of a litigant. In a matter such as the present where a respondent has substantiated a claim on behalf of the applicant the filing a replying affidavit would be unnecessary. Needless to say that this issue of the lien was in any event canvassed at length at the oral hearing where the first respondent relied on clause 2.4 of the agreement which established that it was the applicant's responsibility to hangar the helicopter. However, apart from alleging that the first respondent failed to file a replying affidavit disputing its allegations the applicant provided no further proof that the aircraft was in Mossel bay. It relied entirely on the defence of failure to file a reply and was insufficient to prove that this Court lacked jurisdiction. I have already stated that the Court accepted the evidence of the second respondent in his answering

affidavit to which he stated that he together with the first respondent made numerous attempts to arrange meetings with Wonderbroom Airport to discuss the way forward to which the applicant never attended or plainly ignored. Notably again the applicant provided no explanation regarding its non-attendance at those meetings and did not dispute the second respondent's allegations in his answering affidavit. Therefore, this Court found that the applicant's wilful failure to return the aircraft to its owner after the expiration of the lease agreement and the numerous requests to do so in law would never entitle it to claim an improvement lien.

[15] **I accordingly make the following order:**

1. The application for leave to appeal is refused with costs.

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SARDIWALLA J

JUDGE OF THE HIGH COURT

APPEARANCES:

Date of hearing : 19 August 2020

Date of judgment	**:**	**24 February 2021**
Appellant's Counsel	**:**	**ADV: L HOLLANDER**
Appellant's Attorneys	**:**	**Darryl Furman & Associates**
Respondent's Counsel	**:**	**ADV: F W BOTES SC**
Respondent's Attorneys	**:**	**Gothe Attorneys**