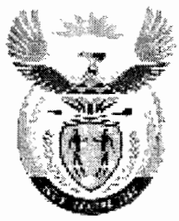


IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 24796/2009

In the matter between:

SHANE BOND **Applicant**

and

ENSPIRE AVIATION (PTY) LIMITED **Respondent**

JUDGMENT : 3 MARCH 2010

TRAVERSO, AJP

[1] This is an application for the winding up of the respondent.

[2] The facts are straightforward.

[3] On 7 November 2008 the parties entered into an agreement in terms whereof the applicant sold certain helicopter spares to the respondent for R5m, which had to be paid in 5 instalments of R1m each.

[4] The first instalment was paid by the respondent. In respect of the second payment R250 000,00 was paid in cash and a motor vehicle at an agreed value of R750 000,00 was transferred to the applicant. Applicant accepted this in *lieu* of the second instalment.

[5] Thereafter certain problems arose between the parties, the details whereof are irrelevant. Suffice it to say that this culminated in the parties entering into an agreement entitled: "*Variation to Sale of Inventory Agreement*". It reads, *inter alia*, as follows:

> ***"The parties have mutually agreed to change the "3 Purchase Consideration" to read as follows:***
>
> ***The purchase consideration will be discharged in the following way:***
>
> *a.* ***Enspire has paid R2 million to date.***
> *b.* ***R1 million will be allocated to the spares already collected by Shane which list is included as appendix 1.***
> *c.* ***Enspire will pay R1 million, within 90 days of the signature of this agreement by both parties.***
> *d.* ***The completed airframe with serial no _____ is to be collateral against default by Enspire.***
> *e.* ***Sale of the airframe prior to expiry of the 90 day period listed in "c" above will trigger a payment, within 7 days of the receipt of the said payment, to Bond equal to the amount of the sale or the outstanding balance due, whichever is the lesser amount.***
>
> ***The purchase consideration listed above, upon execution as contemplated, is in full and final settlement of all outstanding***

obligations between Enspire and Bond, howsoever arising of any nature whatsoever." (Emphasis supplied)

[6] It is on this agreement that the applicant relies for this application.

[7] On behalf of the applicant it was argued that the variation resulted in the respondent becoming liable to pay the applicant R1m by not later than 26 October 2009 – come what may.

[8] The respondent, on the other hand argued that it is not liable because the applicant has failed to deliver all the helicopter parts to respondent as provided for in the agreement.

[9] It is common cause that the respondent deals in helicopters, and that he bought the parts to construct a Bell

206B Jet Ranger helicopter. The respondent therefore contends that it would only become liable for payment once the applicant has delivered all the parts, as provided for in the agreement. The respondent accordingly denies that it is liable to pay the applicant and therefore denies that the applicant has *locus standi*.

[10] The applicant however contends that by virtue of the variation agreement there is no further obligation on him to deliver any further spare parts to the respondent.

[11] This contention by the applicant is wrong.

[12] The original agreement is a reciprocal agreement creating obligations for both parties. The applicant had to deliver the parts in return wherefore the respondent had to pay.

[13] The variation agreement does not vary the entire agreement. It merely amends clause 3 thereof which carries the heading "*Purchase Consideration*". The remainder of the original agreement was left intact, and consequently the remaining rights and obligations of the parties continued to exist. The applicant is therefore wrong when it contends:

> ***"11.4 The amount which was provided for in the variation agreement to be paid to me was payable within 90 days of signature of the variation agreement. There was no corresponding or reciprocal obligation on my part in this regard."***

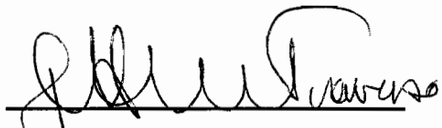
[14] This was also Mr. Kantor's argument. It is however flawed for two reasons. The variation agreement only amends one clause of the agreement. The clause specifically provides for the purchase consideration to be paid "*upon execution as contemplated*". This clause can only refer to the execution of the applicant's obligations in terms of the main agreement. The respondent contends that the applicant has not fulfilled its obligations in terms of the

agreement and that therefore payment is not due. The applicant however contends that "*all allegedly outstanding issues between the parties had been swept away by the Variation Agreement.*"

[15] Mr. Kantor attempted to justify his argument by referring to certain correspondence which appears to indicate that the amount is due and payable. This contention is also without merit. In the correspondence Mr. Moses indicates that he is in discussions with the shareholders of the respondent. His personal view is therefore irrelevant. The applicant contracted with a company – not with Mr. Moses in person.

[16] From all this it follows that the applicant had failed to establish on the balance of probabilities that it has a claim against the respondent and accordingly has failed to establish its *locus standi.*

[17] Accordingly the application is dismissed with costs.



TRAVERSO, AJP