



REPUBLIC OF SOUTH AFRICA  
**IN THE HIGH COURT OF SOUTH AFRICA**  
**(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: 21627/16

In the matter between:

**SHEZIPHASE (PTY) LTD**

Applicant

and

**EUROPEAN SOUTH AFRICAN  
CHAMBER OF COMMERCE (PTY) LTD**

First Respondent

**AERIOS GLOBAL AVIATIONS (PTY) LTD**

Second Respondent

Heard: 16 November 2016

Delivered: 21 November 2016

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**JUDGMENT**

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**BOQWANA, J**

**Introduction**

[1] On 03 November 2016, the applicant brought an *ex parte* urgent application against the respondents for an order directing the respondents to forthwith restore possession of the Eurocopter Gazelle with registration number SA341G Gazelle

(‘the helicopter’) to the applicant and that the same may not be unlawfully removed.

[2] The applicant alleges in its founding affidavit that the helicopter was removed from the applicant’s possession on 02 November 2016. Mr Jonathan Killik who is a deponent to the founding affidavit and a director of the applicant asserts that he was advised by one Darryl Waterford of Base 4 Aviation on 01 November 2014 (sic) that the second respondent, on the instructions of the first respondent removed the helicopter from the premises onto the tarmac and thereafter moved it to the premises of the second respondent. This was done without the applicant’s consent.

[3] Mr Killik further alleges that the respondents had no right to remove the helicopter from the premises as he had informed the first respondent that he was asserting a lien over the helicopter, (I assume on behalf of the applicant) and that their conduct amounted to unlawful dispossession. The lien was allegedly for improvements and services rendered to the first respondent.

[4] An order was issued by this court on 03 November 2016 pursuant to the *ex parte* urgent application, for the sheriff to take possession of, retain the helicopter and transport it to Base 4, Hangar 10/Plot 10, Convair Road, Cape Town International Airport (‘Hangar 10’), with the assistance of the applicant. A rule nisi was issued for the respondents to, *inter alia*, furnish reasons why the applicant should not retain the helicopter. In terms of the order the respondents could anticipate the return day on 48 hours’ notice to the applicant.

[5] On 14 November 2016, the first respondent filed a notice of anticipation in accordance with paragraph 8 of the order. The application was argued before me on 16 November 2016 with Mr Joubert representing the applicant and Mr Kantor the first respondent.

[6] The first respondent contended that no case was made out that the applicant was in possession of the helicopter, and furthermore the applicant failed to disclose material facts to the court when bringing the *ex parte* application, which facts

might have led the court to reach a different conclusion. The first respondent therefore submits that the applicant's case should be dismissed on that basis alone, (apart from it not having shown possession) and that costs should be awarded on the scale as between attorney and client against the applicant.

[7] The law in cases of *mandament van spolie* is trite. It has been traversed in many cases. In *Chopper Worx (Pty) Ltd & Another v WRC Consultation Services (Pty) Ltd* 2008 (6) SA 497 (C) at para 9, Moosa J referred to *Scoop Industries (Pty) Ltd v Langlaagte Estate and GM Co Ltd* 1948 (1) SA 91 (W) at 98 – 99, summarising the legal position as follows:

‘Two factors are requisite to found a claim for an order for restitution of possession on an allegation of spoliation. The first is that applicant was in possession and the second, that he has been wrongfully deprived of that possession and against his wish. It has been laid down that there must be clear proof of possession and of the illicit deprivation before an order should be granted. (see **Rieseberg v Rieseberg** (1926, WLD 59, at 65).) It must be shown that the applicant had had free and undisturbed possession (**Hall v Pitsoane** (1911, TPD 853).) When it is shown that there was such possession, which is possession in physical fact and not in the juridical sense, and there has been such deprivation, the applicant has right to be restored in possession *ante omnia*. On a claim for such restoration it is not a valid defence to set up a claim on the merits.’ (Own emphasis)

[8] I do not need to refer to other trite principles relating to spoliation matters as the law reports are abounding with cases on this issue, save to state that the court need not enquire into the underlying rights of the parties. Furthermore, the onus rests on the applicant to prove the required possession and unlawful deprivation of such possession. The applicant must prove facts necessary to justify a final order – that is, that the things alleged to have been spoliated were in its possession, and that they were removed from its possession forcibly or wrongfully or against its consent (see *Chopper Worx* supra at para 11).

[9] The sole allegation of possession relied upon by the applicant is found in paragraph 15 of the founding affidavit which states the following: ‘*The applicant*

*was in possession of the helicopter and the helicopter was stored at EC Aviation in Cape Town.'*

[10] It is not stated how and when the applicant became or was in possession of the helicopter and who EC Aviation was and how it came about that an applicant whose business address is in Woodmead, Sandton was in possession of a helicopter stored in premises of an entity in Cape Town, whose identity and connection with the applicant is not explained in the founding papers.

[11] It is in the answering affidavit that more information is revealed. It is alleged therein that the helicopter was in fact delivered in Gauteng in February 2016. The applicant performed work on the helicopter in Gauteng from time to time in respect of which it was paid and that a total of R1.8 million had been paid. Mr Killik flew the helicopter to Cape Town in July 2016. On 19 July 2016, Mr Killik purportedly acting on behalf of an entity known as Aviation Towards Success CC ('ATS') concluded an agreement of lease in respect of the helicopter with EC Aviation in order for it to be hangared by EC Aviation. A copy of this lease agreement dated 19 July 2006 is attached to the answering affidavit. In terms of the lease agreement the tenant, i.e. ATS, *inter alia*, agreed to pay EC Aviation an amount of R3500.00; the helicopter would not be moved unless one of EC Aviation engineers was there to assist. Most importantly, the lease was on a month to month basis starting from 15 July 2016 and EC Aviation could terminate it within a 48 hour period, and in the event any account being outstanding, the machine would not be permitted to move.

[12] The helicopter was stored at EC Aviation's hangar at Cape Town International Airport. Mr Killik returned to Gauteng where he and the applicant conduct business. Brett Aarninkhof, the attorney of record for the respondents who deposed to the answering affidavit alleges that he was then told by Ari Kraak of EC Aviation in early September 2016 that ATS was not paying rental in respect of the lease and Mr Kraak wanted payment from the owner of the helicopter. It was agreed that a lease would be concluded between EC Aviation and the first

respondent in respect of the storage of the helicopter at EC Aviation's hangar. That lease agreement was concluded on 15 September 2016 and it is also attached to the answering affidavit. Mr Aarninkhof alleges further that the first respondent has had full access to work on the helicopter as it pleases and even repainted it at some point, as an example. Same could not be said of the applicant.

[13] On 18 October 2016, Mr Killik sent an email to Mr Kraak as follows:

‘ Hi Ari

For Clarity

The contents of this mail below are still unresolved and our Lien's are still in full force and effect.

We in terms of the ATO and Hangarage leases etc, may appoint maintenance officers. I have appointed Aristide to remove the torque meter.

Until such time as the financial matters have been resolved, we have a Lien over the aircraft, even whilst in your hanger. As we entered into that lease with yourselves.

We insure the aircraft and are in full possession of the aircraft until released to the owner.

Trust this clarifies' ('Own emphasis')

[14] To which Mr Kraak answered:

‘ Hi Jonathan

Your lease has expired, it was month to month and we have not renewed it. The lease is now held with the owner of the machine.

I am not in any position to comment, but I will however not allow anyone to remove any part of the helicopter in my hangar unless they are licensed engineers from the AMO that looks after the machine.

I also will not allow anyone to remove anything from the machine without consent of the owner.

ECA will report anyone on our premises (sic) removing anything from the machine to the CAA and the SAPS.

Trust you understand' ('Own emphasis')

[15] These facts are in any view material to the spoliation application and should have been disclosed to the court when the *ex parte* application was brought. They were within the knowledge of the applicant. Mr Joubert argued that the applicant was within its rights to decide which facts it required to place in the founding affidavit and according to it those facts were not material to the case it needed to place before the court. In his view the allegation in paragraph 15 of the founding affidavit was sufficient.

[16] He further submitted that the applicant need not have physically held the property in order to benefit from the *mandament*. It must have had physical control or *detentio*. He referred to the decision of De Villiers JP in *Moosa v Construction Works* 1958 (2) SA 334 (E) at 337A where the court held:

'If I get permission from some person to push my car on his premises and do so he does not hereby get physical control or the '*detentio*' of my car. To bring that about I must make him the deposition or custodian of my car.'

[17] Mr Joubert therefore argued that parking the car in a garage or a helicopter in a hangar does not deprive the applicant of its *detentio*. Therefore, if the owner of the garage purports to revoke permission to park, the applicant does not lose it *detentio*.

[18] The facts that support possession in the present matter, in Mr Joubert's view, are that the applicant was in full possession of the helicopter when Mr Killik flew it to Cape Town in July 2016. He, Mr Killik arranged for the storage of the helicopter with EC Aviation. The respondents removed the helicopter from EC Aviation and took it to another hangar without the applicant's consent.

[19] Apart from the fact that these two facts originate from the answering affidavit, they do not support a case of possession by the applicant, in that they leave out important detail, which is that (a) the entity that entered into a lease

agreement with EC Aviation to store the helicopter represented by Mr Killik was not the applicant but ATS, ATS is not the applicant, (b) Mr Killik flew back to Gauteng when he and the applicant conduct business after he flew the helicopter to EC Aviation and (c) the lease agreement was month to month and it expired after non-payment and was not renewed.

[20] Mr Joubert argued that a link must be made between the applicant and ATS because Mr Killik was associated with both entities. I do not see how that can be done, ATS is not the applicant and the lease agreement made no mention of the arrangement being made by or on behalf of or in connection with the applicant. The lease with ATS was, in any event, terminated and at the time of the removal of the helicopter the lease was no longer with ATS but with the first respondent. So, from the word go, i.e. since July 2016, the helicopter was not stored in EC Aviation's premises at the instance of the applicant. Nowhere in the papers does one find support for that proposition. When Mr Killik wanted to seek clarity, and assert his lien he was categorically told by Mr Kraak that 'I will not allow anyone to remove anything from the machine without consent from the owner... ECA will report anyone on our premises (sic) removing from the machine to the CAA and the SAPS...'

[21] To suggest that the lease agreement is irrelevant in this particular case is unsustainable. Mr Kraak asserted EC Aviation's physical control of the helicopter and he was not contradicted by Mr Killik. Clearly once the helicopter was flown by Mr Killik and the applicant to Cape Town and he went back to Gauteng where he and the applicant conduct business, it had been hangared with EC Aviation. Evidently, the applicant has not placed any facts before this court to suggest that it had full access and *detentio* to the helicopter such as for instance, that it could go to the premises where the helicopter was stored at any time since July 2016, to conduct repairs or do whatever else that needed to be done or taken out of the helicopter as it pleased. Such facts could have been useful. As was held in *Ex Parte Van der Horst: In Re Estate Herold* 1978 (1) SA 299 (W) at 301 F – G '...a person has detention even if he leaves the property but is capable of assuming occupation at

any time. What is required is that the person in question should manifest the power at his will to deal with the property as he likes and to exclude others.’

[22] Mr Joubert attempted to argue that the applicant had keys to the helicopter, which case is not made out in the applicant’s founding papers. The applicant also alleged that it was in possession of a logbook. I am not convinced that being in possession of a logbook amounted to possession of the helicopter.

[23] Apart from the bare allegation in paragraph 15 of the founding affidavit that the applicant was in possession of the helicopter and the helicopter was stored at EC Aviation in Cape Town, there are no facts presented by the applicant proving that it was in possession of the helicopter before its removal. The allegation in paragraph 15 is insufficient. The applicant quite clearly left out material facts which, if disclosed to the court hearing the *ex parte* application, might have led to a different conclusion. For these reasons, the applicant’s application must be dismissed and the rule nisi be discharged.

[24] As to costs, the first respondent asked for costs on the scale as between attorney and client on the basis of the applicant’s failure to disclose material facts to the court in its *ex parte* application, which it had a duty to do, in the absence of the other party in court. The first respondent submitted that the court ought to show its displeasure with such conduct.

[25] I am satisfied that a proper case had been made out for costs to be awarded against the applicant on a scale as between attorney and client. As Mr Kantor submitted, the court need not find that the conduct was fraudulent or intentional. I conclude, therefore, with the court’s observations in the decision of *Schlesinger v Schlesinger* 1979 (4) SA 342(W) at 354 D that by making such a finding, ‘I am not ...imputing fraudulent conduct to either the respondent or her attorney, but a reckless disregard of a litigant’s duty to a Court in making a full and frank, disclosure of all known facts which might influence the Court in reaching a just conclusion.’

[26] In the result, I make the following order:



1. The rule nisi issued in the above matter on 3 November 2016 is discharged and the interim relief granted by this Court on 3 November 2016 is hereby set aside.
2. The Sheriff of this Court, or his lawful Deputy, is authorised and directed to return the Eurocopter Gazelle helicopter with registration number SA341G ('the helicopter') held at Hangar / Plot 10, Convair Road, Cape Town International Airport (or wherever it may be found) to the Second Respondent at Hangar 2, Douglas Road, General Aviation Area, Cape Town International Airport.
3. The Applicant, and any persons present at Hangar / Plot 10 are ordered to:
  - 3.1 Immediately hand over the helicopter to the Sheriff, his lawful Deputy and/or First Respondent;
  - 3.2 Inform the Sheriff, his lawful Deputy and/or First Respondent to whom the helicopter has been delivered as well as the location of the helicopter.
4. The costs of this application are to be paid by Applicant on the scale as between attorney and client.

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**N P BOQWANA**

Judge of the High Court

**APPEARANCES**

For the Applicant : Adv. Z Joubert

Instructed by : Martin Pike Incorporated  
c/o Smith & De Jongh Attorneys, Bellville

For the First Respondent : Adv. A Kantor

Instructed by : Aarninkhof Attorneys, Cape Town