THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 447/07
Reportable

In the matter between:

CARMEL TRADING COMPANY LIMITED	Appellant
and	
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	First Respondent
HAWKER AVIATION SERVICES PARTNERSHIP	Second Respondent
HAWKER AIR SERVICES (PTY) LIMITED (In Liquidation)	Third Respondent
SOUTH AFRICAN CIVIL AVIATION AUTHORITY	Fourth Respondent

Coram: HARMS ADP, SCOTT, MTHIYANE, NUGENT JJA and MHLANTLA AJA
Heard: 19 NOVEMBER 2007
Delivered: 29 NOVEMBER 2007

Summary: Civil procedure — preservation order — sale of goods in foreign jurisdiction

Neutral Cititation: This judgment may be referred to as *Carmel Trading Company Limited v CSARS* [2007] SCA 160 (RSA)

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[1] A Falcon 900B executive jet has been languishing at the Dassault maintenance facility at Le Bourget Airport near Paris, France, since 3 April 2003. The respondent, the Commissioner for the SA Revenue Services, wishes to have the Falcon (with registration number ZC-DAV) sold and the proceeds kept in trust pending the finalisation of an action instituted by the Commissioner against one David Cunningham King and a number of corporate entities. The Commissioner contends that King and a company of his, Ben Nevis Holdings Ltd, have a substantial income tax liability and that the other defendants were, and are, being used by King to conceal his assets. (King was assessed to tax for more than R900 million and Ben Nevis for more than R1 400 million as long ago as February 2002.) One of these companies is Carmel Trading Co Ltd, the present appellant, and the only entity opposed to the sale of the Falcon.

[2] The Falcon has always been and still is registered in South Africa with the local civil aviation authorities in the name of Hawker Air Services (Pty) Ltd ('HAS'), a company liquidated by order of this Court on 31 March 2006.[1] The holding company of HAS was Metlika Trading Ltd. HAS was an equal partner with Hawker Management (Pty) Ltd ('Manco') in a partnership known as Hawker Aviation Services Partnership and the partnership was the beneficial owner of the Falcon. However, Rand Merchant Bank ('RMB') is said to have been an undisclosed partner holding a 99.8 per cent interest in the Falcon. The Commissioner has an additional VAT related claim against both HAS and the partnership of some R73 million.

[1] *Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd* 2006 (4) SA 292 (SCA).

[3] On 3 September 2002, Hartzenberg J issued a preservation and anti-dissipation order in relation to the Falcon. Such an order, which interdicts a respondent from disposing of or dissipating assets, is granted in respect of a respondent's property to which the applicant can lay no special claim. To obtain the order the applicant has to satisfy the court that the respondent is wasting or secreting assets with the intention of defeating the claims of creditors. Importantly, the order does not create a preference for the applicant to the property interdicted.

[4] But on 5 September 2002 and in spite of the order Carmel 'took over' the interests of RMB and Manco. Carmel's attitude was that since it was not bound by the order it could do so. Under normal circumstances such a taking over would have had the effect of putting an end to the existing partnership and creating a new one. In a later judgment on 18 February 2003, Hartzenberg J extended the preservation and anti-dissipation order and ordered Carmel to return the Falcon to South Africa.[2] (The Falcon had previously been flown out of the country for fear of an attachment by the Commissioner.) He held, in the course of his judgment that the sale of the interests in the Falcon to Carmel was 'a contrived transaction, *in fraudem legis*, to by-pass the preservation order' and that Carmel was but a tool of King and under his direct control.

[5] Carmel and the other interested parties obtained leave to appeal to this Court. In the event this Court dismissed the appeal by Carmel and the already mentioned factual findings of Hartzenberg J were foundational to

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[2] The different orders are quoted in *Metlika Trading Ltd v Commissioner, SA Revenue Services* 2005 (3) SA 1 (SCA).

its judgment.[3] An application for leave to appeal to the Constitutional Court was dismissed.

[6] The Commissioner earlier had sought an order implementing the order to return the Falcon to South Africa pending the finalisation of the said appeal. This had been refused, in part because of a perjured affidavit filed on Carmel's behalf that the Falcon was safely stored and protected in a hangar at Le Bourget. Another reason was that the aviation authorities had grounded the Falcon on 3 April 2003.

[7] The Falcon remained put at Le Bourget and this led to a contempt application against, amongst others, King, HAS and Carmel. King, conveniently, had resigned as director of HAS and this, according to Botha J (who heard the contempt application), meant that he could not be held liable for the breach of the order by HAS. After the dismissal of the contempt proceedings King was reinstated as the sole director of HAS. In any event, since the respondent parties involved 'displayed a willingness to cooperate in bringing about the return of the Falcon to South Africa', Botha J held that in consequence a committal would be inappropriate.[4] He made an order that would 'hopefully have the effect of bringing the Falcon back'. It did not. Metlika, who was supposed to provide the finance for the return of the Falcon, withdrew its financial support; Carmel refused to make any funds available for returning the Falcon; and Carmel refused to give consent to the sheriff to return the Falcon to South Africa.

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[3] *Metlika Trading* paras 18 and 35.
[4] Botha J was also not prepared to judge the role of King in Carmel. Why he did not consider himself bound by the findings of Hartzenberg J does not appear from his judgment.

[8] Carmel, for a reason not disclosed, does not want the Falcon back in the country. It sought to register it in Mauritius and the High Court had to interdict it from doing so. It also made a non-binding offer according to which it would consent to the return of the Falcon provided the liquidator of HAS and the Commissioner release the necessary funds and that it be registered in Mauritius and be used by Carmel for chartering business (the other conditions need not be mentioned – there were many). Once again, it failed to disclose why it wished to have the aircraft removed from the local register, and counsel could not suggest a reason. Otherwise, its attitude is that the Commissioner must carry the risk of paying for the repair and maintenance of the Falcon in order to have it returned. But, as I shall show in due course, Carmel as partner or ex-partner is not entitled to the use of partnership property especially in the absence of the consent of the other partner or (as in this case) the liquidator of HAS. In addition, the undisputed evidence of one Steyn was that it would probably not be profitable to use the Falcon for charter purposes only.

[9] At the time of the preservation order the value of the Falcon was in the vicinity of R200 million. Although King, in previous matters, created the impression that the Falcon was kept in a hangar, the fact of the matter is that it was never so kept. This misrepresentation has not been explained. In any event, it is common cause that the Falcon is fast deteriorating and will soon be basically worthless. To keep it stored in a hangar will only reduce the rate of depreciation but will cost some R150 000 per month. This means that the preservation order has become meaningless unless amplified. The High Court, this time per Preller J, accordingly issued a variation order to the effect that the Falcon should be sold by the sheriff and the proceeds kept in trust in an interest bearing

account pending the outcome of the action. It is this order, which is with the leave of the court below, that is the subject of the present appeal. The detailed terms of the order need not be quoted because the appeal is not directed against the terms of the order but against any sale of the Falcon.

[10] The Commissioner, in the founding affidavit, stated that in the light of the history of the case the behaviour of the new partnership to leave the Falcon stranded and neglected in a foreign country is an obvious and desperate attempt to prevent our courts from eventually making an effective order in respect of this valuable asset. He also alleged that King's apparent attitude is that he must at all cost prevent the Falcon from being brought under the control of the court in the hope that something may happen which will make the Falcon or its value available to him in a foreign country. And, concluded the Commissioner, failing this King is 'patently prepared to see the value of the Falcon lost rather than being utilised to pay' the Commissioner. These allegations have not been controverted.

[11] As Streicher JA pointed out –

'An interdict at the instance of a creditor preventing his debtor, pending an action instituted or to be instituted by the creditor, from getting rid of his assets to defeat his creditors has for many years been recognised in our law [*Knox D'Arcy Ltd v Jamieson* 1996 (4) SA 348 (A) at 372C–F]. It is similar to the *Mareva* injunction in English law.'[5]

He also quoted[6] Lord Donaldson of Lymington MR[7] who said:

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[5] *Metlika* para 35. See also Voet 2.4.18

[6] *Metlika* para 44.

[7] *Derby & Co Ltd and others v Weldon and others (No 2)* [1989] 1 All ER 1002 at 1007f–g.

"We live in a time of rapidly growing commercial and financial sophistication and it behoves the courts to adapt their practices to meet the current wiles of those defendants who are prepared to devote as much energy to making themselves immune to the courts' orders as to resisting the making of such orders on the merits of their case."

[12] I agree with Mr van der Merwe (who, on behalf of the liquidator of HAS, supported the Commissioner and the judgment of Preller J) that, considering the purpose of a preservation order, all the high court was asked to do was to authorise the conversion into cash of a deteriorating asset, which already was the subject of a preservation order. It should be emphasised that previously in this Court Carmel and its associates did not contend that the Commissioner had not established the requisites for a preservation order. Their case concerned the jurisdiction of the court, arguing that the high court did not have jurisdiction because of the doctrine of effectiveness. This argument was rejected but an attempt to resuscitate it before us likewise has to be rejected.

[13] Carmel's opposition to the sale of the Falcon can only be described either as conduct *animo vicino nocendi*, or 'Schadenfreude' (according to Mr Gauntlett for the Commissioner), or to use an old Dutch phrase, 'uyt enckele spijt ende kregelheydt' (merely out of spite and obstreperousness). It reminds one of the farmer who in order to escape paying tithe destroyed his whole crop.[8] The Romans had a short answer for such conduct: 'Malitiis non indulgendum esse' – there must be no indulgence to malice.[9] Carmel's objection lacks reality.[10]

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[8] Van der Merwe & Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* 6 ed p 64 fn 21.
[9] Digesta 6.1.38 (Celsus). The translation is that of Watson. See the chapter with this name in JE Spruit *Metopen: Verzamelde Essays over het Romeinse Recht en zijn Geschiedenis* (2002) p 251.
[10] *MV Spirit of Namibia: Big Red One v Marco Fishing (Pty) Ltd* 2006 (6) SA 309 (SCA) para 14.

[14] Mr Labuschagne's counter on behalf of Carmel was based on s 25(1) of the Bill of Rights, which provides that 'no law may permit arbitrary deprivation of property'. He says that an order to sell the property and keep the proceeds in trust pending the finalisation of the main litigation amounts to an arbitrary deprivation of Carmel's property. This argument breaks down at many levels.

[15] Carmel's first problem is that the Falcon is not Carmel's property. Carmel may have had a proprietary interest in the Falcon in its capacity as partner in the partnership that was the beneficial owner of the Falcon. However, as I have pointed out, the 'taking over' of Manco and RMB's partnership interest was fraudulent and Carmel cannot rely on a simulated and fraudulent agreement.[11] There is a second point. The partnership (whether the old or the new one) was dissolved by the liquidation of one of the partners, namely HAS. A former partner has no proprietary claim in respect of the property of a dissolved partnership. The claim is at best for a proportionate share of the proceeds after liquidation of the partnership because, as Prof Beinart mentioned, common partnership property falls for division between the partners on dissolution, which, in the case of an indivisible object such as the Falcon means that it has to be liquidated.[12]

[16] The next problem Carmel has is that the sale will not amount to a deprivation. If there was any deprivation it was when Hartzenberg J issued the preservation order. The object of the order of Preller J was to replace an asset, which is deteriorating. Carmel's position will not, after a

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[11] Cf *Wells v South African Alumenite Co* 1927 AD 69.

[12] B Beinart 'Capital in Partnership' 1961 *Acta Juridica* 118 at 146.

sale, be any different from what it is now. No one is divested of anything on a permanent basis. The value of the asset is being retained for both the owner and those creditors who, eventually, would be entitled to execute.[13] When asked what the act of deprivation relied on is, counsel said that it was the sale coupled with the retention of the proceeds in trust because Carmel will not have access to the money before the finalisation of the main case. Since Carmel does in any event not have the use of the Falcon the argument is not understood.

[17] Whether the order to sell or the sale is 'arbitrary' depends on whether there is sufficient reason for the deprivation and whether it is procedurally fair; both are factual issues.[14] There can, on the facts recited, be no doubt that the deprivation in this case is by no means arbitrary. The decision to order the sale was taken after a procedurally fair hearing and the reason for the sale is quite obvious. Carmel's argument on the point did not address the constitutional test. Instead, counsel said that the order created a security for the Commissioner which he did not have. That argument is without any merit because, as indicated at the outset of this judgment, a preservation order does not create any security or precedence for the applicant creditor. Another complaint was that the proceeds are to be kept in trust by the attorneys of the Commissioner pending the finalisation of the matter. This, according to the argument gave the Commissioner control over the money, which is nonsense. The money is kept in trust on behalf of the owner of the Falcon. The only effect of the order is that the owner may not dissipate it pending the main case. I should note that there was no attack on the ability or competence of the

[13] Cf *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 35-37.
[14] For the meaning of the term: *First National Bank of SA Ltd t/a Wesbank v Commissioner SA Revenue Service* 2002 (4) SA 768 (CC) para 100.

attorney to hold the money in trust and Carmel did not ask that the money be kept in trust by someone else.

[18] Another argument of Carmel concerns the right of the sheriff to sell the Falcon in the absence of an attachment. The argument is namely that an order of court permitting the sheriff to sell something that has not been attached amounts to an arbitrary deprivation of property. Since the logic escapes me I am unable to deal with the argument any further. Another related argument was that at common law a sheriff could only sell goods that are deteriorating provided they had been attached. For this reference was made to Voet's *Commentarius ad Pandectas* 2.4.61 where Voet said that goods detained by arrest that are not capable of preservation by keeping may be sold under a court order. This section of Voet deals with the effect of an arrest *ad fundandam jurisdictionem* and not with the powers of a court. In other words, Voet did not suggest that courts may only order the sale of attached goods; all he said was that perishable goods that have been attached may be sold in terms of a court order. Carmel also argued that it would be impermissible to use this example of Voet as an analogy in order to make the preservation order effective – why, counsel did not articulate. A similar argument about the court's power to develop the common law was rejected in *Universal City Studios Inc v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) by Corbett JA at 751G-I read with 754G-755A. Lastly, on the attachment point, the submission was made that without an attachment the court cannot accept, considering that the Falcon is not within the country, that the order could be executed and that, accordingly, the doctrine of effectiveness has been satisfied. The answer is to be found in *Bid Industrial Holdings v Strang* [2007] SCA 144 (RSA) at para 55, namely

‘that the responsibility for achieving effectiveness, absent attachment, is essentially that of the parties, and more especially the plaintiff.’

[19] I should in conclusion record one further argument – the others do not justify any judicial time. Carmel relied on a preservation order issued by a Crown Court in England prohibiting Carmel of disposing the Falcon. A sale by the sheriff, said Carmel, would amount to a breach of that order. It is not surprising that, although this was the main defence on the papers, counsel did not press the *non sequitur*.

[20] The appeal is dismissed with costs, including the costs of two counsel.

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L T C HARMS
ACTING DEPUTY PRESIDENT

CONCUR:

SCOTT JA
MTHIYANE JA
NUGENT JA
MHLANTLA AJA