DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

17/03/03

DATE SIGNATURE

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

In the matter between Case number 2486/2002

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Applicant
and	
BEN NEVIS HOLDINGS LTD	First Respondent
METLIKA TRADING LTD	Second Respondent
HAWKER AIR SERVICES (PTY) LTD	Third Respondent
HAWKER AVIATION SERVICES PARTNERSHIP	Fourth Respondent
CARMEL TRADING COMPANY LTD	Fifth Respondent
DAVID CUNNINGHAM KING	Sixth Respondent
THE SOUTH AFRICAN CIVIL AVIATION AUTHORITY	Seventh Respondent

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JUDGMENT

HARTZENBERG J: The applicant and the sixth respondent are engaged in serious litigation about

the sixth respondent's tax liability. The applicant contends that the sixth respondent uses some of the respondents to amass a fortune and to maintain a lavish lifestyle, without paying tax. It wants to pierce the corporate veil. It has instituted action in which such relief is claimed. To preserve its rights it obtained, what has become known in this matter as, a preservation order.

In terms of that order the applicant attached assets of some of the respondents and other entities. Amongst those assets are mansions in Johannesburg and Plettenberg Bay, wine- and game farms and interests in other ventures. In terms of an arrangement between the parties assets can be released from the attachment against security to the value of the assets. This application concerns a Falcon 900 aircraft with registration number ZS-DAV (the aircraft). It is the return day of a provisional order granted by de Vos J on 11 September 2002. In terms thereof the fourth respondent was prohibited from selling the aircraft or an interest therein without the applicant's consent, the third respondent was prohibited from granting consent for the transfer of a partnership interest in the aircraft from the fifth respondent to any entity without the applicant's consent and the third and fifth respondents were prohibited from amending the partnership agreement. The seventh respondent was requested to note the order in its registers applicable to the aircraft. The other prayers were postponed to the return day. Those prayers are for orders to compel the respondents to pay the proceeds of the loan in respect of the financing of the aircraft and the proceeds of a possible sale thereof into a trust account in the country, to prohibit the use of the aircraft for any other purpose than for *bona fide* commercial charter flights, a mandatory interdict against the fourth respondent to procure the return of the aircraft to the country, orders sanctioning the attachment of interests of the fifth respondent and other orders of a procedural nature.

Until the applicant became irksome with its demands for tax the aircraft was used by the sixth respondent personally both locally and on overseas journeys. The sixth respondent also alleges that it was chartered out, mainly in Africa, at lucrative rentals. It was purchased by the first respondent for ±$25 million (R250 million) and replaced an earlier cheaper aircraft. Its value is a large percentage of the value of the attached assets. It was acquired from the first respondent by a

partnership, Hawker Aviation Partnership, on 18 September 2000. The partnership was constituted by a written partnership agreement. It was the predecessor of the fourth respondent, Hawker Aviation Services Partnership. The agreements were amended when the aircraft was acquired.

The disclosed partners in the partnership were Hawker Air Services (Pty) Ltd. (HAS), the third respondent, and Hawker Management (Pty) Ltd. (Manco). The first respondent held the shares in HAS and Rand Merchant Bank (RMB) held the shares in Manco. Both HAS and Manco each held only a 0,1% share in the partnership as disclosed partners. Rand Merchant Bank held a 99,8% share in the partnership as a silent partner. It advanced a term loan to the partnership to pay the purchase price. As security for the loan the first respondent deposited an amount of R171 million in RMB. RMB acted as financier. HAS at all relevant times had the option to acquire the total interest of Manco and RMB as soon as the loan was repaid. HAS would then effectively become the owner of the aircraft. At a stage the first respondent's shares in HAS and its reversionary interest in the deposit of R171 million were allegedly transferred to Metlika Trading Limited, the second respondent.

Although the aircraft was purchased from the first respondent by the partnership it was by agreement registered in the name of HAS with the seventh respondent, the South African Civil Aviation Authority, possibly because it was envisaged that HAS would become the sole owner thereof on repayment of the loan. RMB enjoyed full security in respect of the loan as the deposit of R171 million, was deposited ***in securitatem debiti*** and the original loan advanced by RMB was R171 million.

On 18 February 2002, when the preservation order was provisionally granted, the deposit was still held in the name of the first respondent. Shortly thereafter the first respondent received an income tax assessment from the applicant in an amount of R1 467 844 330. Thereafter and on 21 February 2002 the Bank of Bermuda informed RMB that through an administrative oversight it had failed to inform RMB earlier of the cession of the first respondent's interest to the second respondent. It requested RMB to hold the deposit in the name of the second respondent.

Although RMB held a 99.8% share in the partnership HAS was to manage the operation of the charter business of the aircraft. All losses suffered would be for the account of HAS. 80% of all profits would be for HAS's account. The financial performance of the venture would not be shared in proportion to the interests held in the partnership. It is contended on behalf of the applicant that the transaction resembles an ordinary instalment sale transaction where the financial institution is the owner of a vehicle but the risk and the benefit as well as the right to obtain ownership on repayment of the loan are those of the purchaser.

The applicant contends that the aircraft could not be sold without its consent. It relies on the provisions of the preservation order. The interim order interdicted the first, second, third and sixth respondents from ceding, pledging, alienating, disposing or in any way encumbering their assets, or from drawing or reducing their funds at banking or financial institutions and specifically interdicted HAS from selling or ceding the aircraft or any rights therein to any person. The final order confirmed the interim order in that respect and specifically interdicted the first and the second respondents from disposing of their share holding and loan accounts in HAS and from selling or ceding the aircraft or any rights therein to any person without the applicant's consent.

On 12 August 2002 RMB informed the applicant by letter that it had exercised its rights in terms of the breach clauses in the term loan agreement and applied the security in part settlement of the outstanding loan. According to an affidavit by Ms. Wapnick, one of the partners in the firm of attorneys representing the sixth respondent and the various respondent companies, there was a transfer of £2 million from the Bank of Bermuda to their trust account. The sixth respondent gave the following instructions:

> *"Dear Sharon,*
>
> *Please transfer R24,5 million to RMB in order to settle the amount outstanding from Qwerty Aviation Services ("Qwerty") to RMB in respect of RMB's interest in the Hawker Aviation partnership Please transfer the balance of the proceeds from the Rand equivalent of GBP 2 million to Glenhurst.*

Thanks

(signed) Dave King

16 August 2002"

(Qwerty was a Bermuda shelf company. Its name was changed to Carmel Trading Company Ltd, the fifth respondent, and its domicile was transferred to Port Louis in Mauritius. "Glenhurst" is a reference to Glenhurst Wine Farm (Pty) Ltd., which owns a wine farm in the Western Cape.)

The fifth respondent is managed by its corporate director and manager Sovereign Managers Ltd. Sovereign Managers Ltd operates in Dubai and its head office is in the Turks and Caicos Islands. According to one Kevin O'Farrell of Dubai, who deposed to an affidavit on behalf of Sovereign Managers Ltd., it is an independent company "providing fiduciary services to corporate entities". He refers to another company Sovereign Trust (SA) Ltd. It is a subsidiary company of the sovereign group but "a totally separate and independent entity" also registered in the Turks and Caicos Islands with a head office in Cape Town and registered as an external South African company. According to him the fifth respondent was formed with the specific purpose of acquiring an interest in an international aircraft charter concern. It at all times wanted the aircraft to be registered with the Civil Aviation Authority in Mauritius. He states that during August 2002 the fifth respondent acquired RMB's 98,8% interest in the fourth respondent as well as Manco's 0,1%. A new partnership between HAS and the fifth respondents was constituted. It is separate and distinct from the previous partnership.

There is indeed a written agreement. The alleged parties thereto are First Rand Bank (the successor of RMB), Manco, Carmel Trading Company Ltd. (the fifth respondent), HAS and the fourth respondent partnership. It was signed on 8 August 2002 "For and on behalf of Sovereign Managers Ltd" on behalf of the fifth respondent. (According to O'Farrell's affidavit that was the only function which he,on behalf of Sovereign Managers, has performed for the fifth respondent.) It was also signed on that day by somebody on behalf of HAS. No one of the other parties has

signed the agreement. Clause 2.1.2 thereof provides that the date of signature of the agreement means the date on which the last party signs it. The document provides that the fifth respondent binds itself to the terms and conditions of the partnership agreement (between Manco, RMB and HAS) and that the sellers delegate all their obligations to HAS and that "HAS consents to such delegation and approves the purchaser (fifth respondent) as the delegatee". It records further that the purchaser has paid the purchase price of R24 550 450.

O'Farrell states that the acquisition of the 99,9% interest in the fourth respondent was an equity investment, which did not result in the creation of any indebtedness by the fourth respondent to the fifth respondent nor in the creation of a loan account in the fourth respondent in favour of the fifth respondent. Because of the registration of the aircraft with the South African Civil Aviation Authority it cannot be transferred for registration with another aviation authority, without its consent. In order to operate it from outside the country will be expensive as engineering certificates of fitness, by South African engineers who have attended to the aircraft, will have to be submitted to the local civil aviation authority, the seventh respondent, which is subject to the interim interdict. The fifth respondent has offered to pay an amount of R250 000 to HAS for its 0,1% share in the partnership. There is a counter application for leave to HAS to sell its interest to the fifth respondent.

What is evident is that apart from Mr. O'Farrell's bald statement there is no indication of how the transaction in terms of which the fifth respondent acquired the 99,9% share in the partnership was structured and what the underlying agreements were. The R24,5 million was paid by the attorneys to RMB. Did HAS then become the sole owner of the aircraft? It was entitled to do so. Did HAS or the second respondent which allegedly owns all the shares in HAS conclude the deal with the fifth respondent? We know that the sixth respondent advanced R24,5 million to the fourth respondent to acquire RMB's interest in the aircraft. It was a sound business proposition as the aircraft is worth at least R190 million depending on the exchange rate between the Rand and the US dollar. By paying the R24,5 million it had a liquidated interest of R24,5 million. What

happened to the amount of equity paid by the fifth respondent and to whom is a mystery. What happened to the liquidated claim of R24,5 otherwise than to have been acquired by the fifth respondent is likewise unexplained.

In order to found and confirm jurisdiction against the fifth respondent the applicant attached, at the offices of RMB and at the Wierda Valley branch of First National Bank, both the fourth and the fifth respondents' claim in respect of the R24,5 million paid to RMB and both the fourth and the fifth respondents' claim in respect of an amount of R10 797,00 in an account of the fourth respondent in that branch. There are returns of service to that effect. The applicant has placed conclusive evidence before the court that the aircraft is since June 2002 hangared in Basel in Switserland.

Mr. Van der Nest on behalf of the second and third respondents argued that the preservation order was not wide enough to prohibit RMB to exercise its rights in terms of the term loan agreement. The argument is that it did so lawfully and that it was replaced as financier by the fifth respondent. The argument is further that the fourth respondent is the owner of the aircraft, not subject to the preservation order and accordingly fully entitled to have dealt with the aircraft as it pleases. Mr. Wasserman on behalf of the fourth and fifth respondents supports the argument wholeheartedly. The fact is that on payment of the R24,5 million, RMB disappeared from the picture. Who paid the R24,5 million to RMB?. We know that the sixth respondent provided the money. Did he pay it on behalf of the fifth respondent or on behalf of HAS? If he paid it on behalf of the fifth respondent the inference is unescapable that it is just using the fifth respondent to frustrate the provisions of the preservation order. Where the respondents put their case on paper one would have expected a detailed explanation of how the transaction is structured. Now the position is that the respondents who are subject to the preservation order abandoned a valuable interest in the aircraft (at least R165 million) in favour of the fifth respondent and actually paid R24,5 million to be able to do so. Moreover the information supplied by the fifth respondent is of such a suspicious nature that it would be naive to regard it as an innocent third party who became a party

to an arms-length transaction I do not have the slightest hesitation to find that the sale, or whatever the agreement was, to the fifth respondent is not a *bona fide* sale but is a contrived transaction, *in fraudem legis*, to by-pass the preservation order. The fifth respondent is a tool of the sixth respondent and under his direct control. The respondents were interdicted from transferring their interests in the aircraft. . The first and main argument for the respondents as well as the counter-application must therefore fail.

The other grounds of criticism against the provisional order are that the court does not have the jurisdiction to grant such an order, that there was no proper attachment of assets of the fifth respondent to confirm jurisdiction and that the court has no jurisdiction over the *peregrinus* fifth respondent. It is argued that the aircraft is outside of the country and that the court has no control over the process in terms of which the aircraft is to be returned to the country. Reliance is placed on cases such as *Lenders & Co Limited v Lourenco Marques Wharf Co Limited,* 1904 TH 176 at 180/1, *Minister of Agriculture v Grobler*, 1918 TPD 483, *South Atlantic Islands Development Corporation Ltd. v Buchan* 1971 (1) SA 234 (C) and *Makoti v Brodie and Others* 1988(2) SA 569 (B). The argument is further that the provisional order and the postponed prayers are actually intended at executing a tax debt in a foreign country. The argument is that it is not permissible and for this proposition reliance is placed on *Commissioner of Taxes Federation of Rhodesia v Macfarland*, 1965 (1) SA 470(W), *Standard Bank of South Africa Limited v Ocean Commodity Inc.*, 1980(2) SA 175 (T) and *Priestly v Clegg*, 1985 SA 955 (T).

In my view those two arguments cannot be entertained because the respondents, in breach of a court order, caused the situation to arise. In terms of the preservation order the persons with the only meaningful interest in the aircraft HAS, and through it the second respondent, if not the first respondent, were interdicted from alienating their interests. Through a ruse they claim that they have now lost those interests. As I have already indicated they knew full well that they were attempting to get an asset worth ±R200 million out of the country. The order which was granted as well as the postponed prayers were aimed at re-astablishing the *status quo ante*. In so far as it

will require of one or more of the respondents to do something to get the aircraft back into the country it is the result of deliberate deceitful conduct to frustrate the applicant's rights in terms of the order. That conduct evidences contempt for the preservation order. In *Hugo v Wessels*, 1987 (3) SA 837 (A) 855J-856B Hoexter JA points out that in case of failure to comply with an order *ad factum praestandum* contempt proceedings may be an effective measure to enforce compliance with the order. In my view this case is really one where the respondents may well be compelled to comply with the present order in order to restore the position as it was when the provisional preservation order was granted, during February 2002.

As to the argument that there was no proper attachment of assets of the fifth respondent the answer is simply that if the fifth respondent is a *bona fide* outsider there is no conceivable possibility that if it paid R24,5 million towards the acquisition of the aircraft that it will not have the assets which were attached. In my view the attachment was in order. That being so, the applicant is entitled to join the fifth respondent as a defendant in the action for the piercing of the veil.

The applicant asks for a special order as to costs. In my view, in the light of the reprehensible conduct of the respondents, it is entitled to such an order. The applicant provided me with a draft order, which it asks me to make an order of court. I am satisfied that I can make such an order. I have marked it "X".

I make an order in terms of the draft order, "X".

.....

W J HARTZENBERG

JUDGE OF THE HIGH COURT

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

Case No. : 2486/2002

BEFORE: ON 4 FEBRUARY 2003 BEFORE THE HONOURABLE MR JUSTICE HARTZENBERG

In the application of:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	APPLICANT

and

BEN NEVIS HOLDINGS LTD	FIRST RESPONDENT
METLIKA TRADING LIMITED	SECOND RESPONDENT
HAWKER AIR SERVICES (PTY) LTD	THIRD RESPONDENT
HAWKER AVIATION SERVICES PARTNERSHIP	FOURTH RESPONDENT
CARMEL TRADING COMPANY LIMITED	FIFTH RESPONDENT
DAVID CUNNINGHAM KING	SIXTH RESPONDENT
THE SOUTH AFRICAN CIVIL AVIATION AUTHORITY	SEVENTH RESPONDENT

DRAFT ORDER

HAVING HEARD argument and having read the papers filed, the following order is made:

1 The following interim orders made on 11 September 2002 ~~is~~ are confirmed, which orders will serve as interim orders pending the finalisation of the Applicant's action under case number 20827/02:

1.1 The 4th Respondent ("the Partnership") is be prohibited from selling the Falcon 900 aircraft, registration number ZS-DAV or any interest therein, without the prior written consent of SARS, which consent may not be unreasonably refused, or the consent of its this Honourable Court.

1.2 Hawker Air Services (Pty) Ltd (3rd Respondent) is interdicted from granting consent for the transfer of a partnership interest from the 5th Respondent to any person and/or entity without the prior written consent of SARS, which consent will not be unreasonably refused, or the consent of this Honourable Court.

1.3 The partners to the partnership agreement, the 3rd and the 5th Respondents, are prohibited from amending the partnership agreement without the prior written consent of SARS, which consent shall not be unreasonably withheld, or without the consent of this Honourable Court.

1.4 The 7th Respondent is requested to note this order in its

registers pertaining to the Falcon 900 ZS-DAV aircraft.

1.5 The attachment of following assets of the Fifth Respondent, Carmel Trading Company Limited, *ad confirmandam jurisdictionem alternatively ad fundandam jurisdictionem*, is confirmed:

1.5.1 Its partnership share in the Hawker Aviation Services Partnership (4TH Respondent);

1.5.2 Its loan account in Hawker Aviation Services Partnership (4TH Respondent) in an amount of approximately R24.5 million;

1.5.3 Its share in the claim by the partnership against this Sandton branch of First Rand Bank in respect of the credit balance in an amount of approximately R10,797.00 available in the Fourth Respondent's banking account, account number: 62011195204;

1.5.4 Authorising and directing the sheriff or his deputy having jurisdiction to attach the assets identified in paragraphs 1.5.1 to 1.5.3 above

ad confirmandam and *ad fundandam jurisdictionem* respectively.

2 The following orders are made which orders will serve as interim orders pending the finalisation of the Applicant's action under case number 20827/02:

2.1 That if the R192,300,000.00 loan, or any part thereof, due by the partnership (4th Respondent) to Ben Nevis Holdings Limited (1st Respondent) and/or Metlika Trading Limited (2nd Respondent) and/or Hawker Aviation Services (3rd Respondent), becomes due and payable, the payment thereof will only be made into a trust account in the Republic of South Africa, and nowhere else, and that it be kept therein pending the outcome of the Applicant's action under case number 2087/02.

2.2 That the Falcon 900 aircraft, registration number ZS-DAV, may only be utilised for bona fide commercial charter flights as intended in the partnership agreement and that Hawker Air Services (Pty) Ltd (3rd Respondent) and the partnership (4th Respondent) be prohibited from granting consent for it to be used for any other purpose, without the prior written consent of SARS, which consent shall not be unreasonably

be withheld, or the consent of this Honourable Court.

2.3 That in the event of the sale of the Falcon 900 aircraft, registration number ZS-DAV, the purchase price thereof be paid to the Partnership in South Africa, and deposited into and kept in a trust account unless otherwise authorised by an order of this Honourable Court, pending the outcome of the action. This order will be subject to the Applicant launching an application to join the 5th Respondent in the action within 30 days after the grant of this order, with a suitable prayer to the effect that the 5th Respondent's interest in the aircraft should be declared executable for the tax debts of Mr King (6th Respondent) and/or Ben Nevis Holding Limited (1st Respondent).

2.4 That the partnership take all the necessary steps to procure the return of the aircraft to South Africa, and that it may only thereafter leave South Africa temporarily for bona fide charter flights, or for other purposes, only with the prior written consent of the Applicant, which consent will not unreasonably be withheld, or without the consent of this Honourable Court.

2.5 That the Fourth Respondent be directed to furnish SARS

information regarding their monthly income and expenses and proposed flight schedules of the aircraft.

3 The orders referred to in prayers 1 and 2 above ~~is~~ are regarded as an addition to the orders granted by this ~~Honourable~~ Court on 3 September 2002 under case number 4745/02.

4 It is ordered that service of the application to join the 5th Respondent as a defendant in case number 20827/02 is to be affected at Cliffe Dekker Inc. Attorneys.

5 That the Second to Sixth Respondents be ordered to pay the costs of this application, including the costs that were reserved on 19 November 2002, jointly and severally, at a scale as between attorney and own client, including the costs of three counsel.

BY ORDER

THE REGISTRAR

THE COURT