



NOT REPORTABLE

CASE NO: SA 25/2023

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

BATELEUR HELICOPTERS CC

Appellant

and

NELSON KALANGULA

Respondent

Coram: ANGULA JA, SMUTS AJA and FRANK AJA

Heard: 4 June 2025

Delivered: 20 June 2025

Summary: The appellant initiated legal proceedings against the respondent seeking damages in the amount of N\$2 254 017, 23. The damages were alleged to have arisen due to the respondent's negligence in operating a helicopter that had been made available to him by the appellant. The appellant claimed that at all material times, it was either the owner or bona fide possessor of the helicopter, and that the risk of loss and profit had passed to it. The helicopter in question was a Robinson R44, with the registration number V5-HEI.

The court *a quo* dismissed the appellant's claim, holding that the appellant had failed to prove ownership of the helicopter and therefore lacked *locus standi* to bring the action. Because of this finding, the court *a quo* did not make any determination on the alleged negligence of the respondent or the extent of the damages claimed, despite the fact that evidence on those issues had been presented during the proceedings. The focus of the court *a quo*'s decision was solely on the appellant's inability to provide documentary evidence confirming ownership of the aircraft.

Following the dismissal of its claim by the court *a quo*, the appellant lodged an appeal primarily against the court's finding that it lacked *locus standi*. In its initial notice of appeal, the appellant sought not only to overturn the finding of lack of standing but also requested that this Court enter judgment in its favour for the damages claimed. However, in its written submissions to this Court, the appellant narrowed the scope of its appeal. It abandoned the prayer for damages and instead requested only that this Court set aside the court *a quo*'s finding on *locus standi* and refer the matter back for determination on the substantive merits. After receiving the appellant's heads of argument, the respondent withdrew his opposition to the appeal, indicating that he would abide by this Court's decision on the issue of *locus standi*.

The sole issue before this Court was whether the appellant had *locus standi* to institute the action by virtue of being the owner or lawful possessor of the helicopter.

Held that, the onus of proof rested on the appellant, as the party asserting ownership or possession.

Held that, a party in litigation may be assisted in discharging the onus by the existence of a presumption that may arise from the existence of the established facts and which would then place a burden on the opposing party to either adduce contrary facts or to prove what the opposing party asserts.

Held that, in law, a rebuttable presumption of ownership arises from possession of a movable thing.

Held further that, the appellant had clearly established possession of the helicopter through various uncontested facts and witness testimony.

Held that, given that the appellant was in possession of the helicopter and there was no substantive challenge to that possession (other than the lack of documents), the presumption of ownership had not been rebutted.

Held further that, the respondent's stance — that ownership must be proven by documents alone — was insufficient to displace the presumption arising from the facts.

Held that, the appellant did have *locus standi*, and the court a quo's finding to the contrary was erroneous in law and fact.

Consequently, the court a quo's judgment is set aside and the matter is remitted for determination on the substantive issues of negligence and damages with no order as to costs.

APPEAL JUDGMENT

FRANK AJA (ANGULA JA and SMUTS AJA concurring):

I Introduction

[1] Appellant instituted action against respondent for damages allegedly suffered as a result of the negligence of the respondent when the latter made use of a helicopter availed to him by the appellant. The amount of the damages sought in the particulars of claim was N\$2 254 017,23.

[2] The matter went to trial and the claim was dismissed on the basis that the appellant did not prove its ownership of the helicopter and hence its *locus standi* to sue for damages caused to it. Because of the aforesaid conclusion of the court a quo, it did not deal with the question of the alleged negligence of the respondent nor with the question of the extent of the damages caused although the evidence in respect of all the issues was led.

[3] The appellant in its notice of appeal raised a number of grounds of appeal against the mentioned finding of the court *a quo* and also indicated that at the appeal it would seek an order for the damages claimed. In its heads of argument to this Court, it however changed its stance and only sought a reversal of the finding by the court *a quo* that it did not have *locus standi* and a referral back to the court *a quo* to deliver a judgment on the merits of the matter.

[4] The respondent initially filed a notice of opposition to the appeal but subsequent to the receipt of the heads of argument filed a notice indicating that as the appellant only sought a referral back to the court *a quo* to determine the merits of the claim the respondent no longer opposed the appeal but abides the decision of this Court in respect of the *locus standi* issue.

[5] This judgment thus deals only with the question of the *locus standi* of the appellant to have instituted the action.

Background

[6] In the amended particulars of claim the entitlement to claim the damages is averred as follows:

‘At all relevant times hereto, the plaintiff was the owner of a Robinson R44, helicopter with registration number V5-HEI, alternatively the *bona fide* possessor of such aircraft the risk of loss and profit has passed to the plaintiff.’

[7] The plea of the respondent to the aforesaid averment reads as follows:

‘The defendant pleads that he has no knowledge of the contents herein and that the plaintiff is put to full proof thereof.’

[8] The court *a quo* correctly noted that as a result of the plea the issue of ownership or possession of the aircraft remained a live issue and that the appellant had to establish its version at the trial. The court *a quo* noted that 'it is an evidentiary principle in our law that he who alleges must prove'. It was stated that this becomes more pronounced where an allegation made is denied . . .', and that the plaintiff had to place evidence before court to back the allegation that it was the owner or lawful possessor of the aircraft.

[9] The court *a quo* referred to an extract from the evidence of Mr Swart, the sole member of the appellant to find that ownership was not proved. This extract reads as follows:

'Q: You testified that the plaintiff is the owner of the helicopter?

A: Yes my Lord.

Q: There is no proof thereof before this court.

A: Yes, there is no proof of ownership.

Q: for that reason, the plaintiff is not the owner of the aircraft?

A: I disagree. I can proof that I am the owner because it is on the plaintiff's licenses.'

[10] It needs to be mentioned that the cross-examination proceeded on different issues subsequent to it being established that no documentary evidence evidencing the ownership of the helicopter was discovered. The legal representative did not take the issue further when the witness referred to the licences and left the matter there. It follows that the admission relating to the failure to prove ownership was based on the fact that no documentary evidence had been presented and that the whole basis of disputing the ownership was based solely on the lack of documentation in this regard.

[11] In essence, the stance of the respondent is simply, if appellant cannot provide documentary evidence of ownership he (the respondent) would not accept this as a fact.

Proof of ownership

[12] Whereas the court *a quo* correctly stated that the onus was on the appellant (as plaintiff) to prove ownership the focus on the admission by Mr Swart and the lack of documentary evidence indicating ownership of the helicopter to the exclusion of the other evidence was too narrow an approach in the circumstances of the case.

[13] A party in litigation may be assisted in discharging the onus by the existence of a presumption that may arise from the existence of the established facts and which would then place a burden on the opposing party to either adduce contrary facts or to prove what the opposing party asserts.

[14] In the present matter, the presumption that a possessor of movable property is the owner thereof is of relevance and is in essence what the appellant relies on in this Court to submit that appellant did discharge the onus to establish ownership of the helicopter. I deal with the presumption and the facts below but it should be stated that in view of the approach on behalf of the respondent in the court *a quo* to this issue which I dealt with above follows that if the presumption is applicable then the appeal should succeed as no doubt is cast on the claim of ownership other than the lack of supporting documentation.

[15] In *Marine Time Company Incorporated v MFV 'Rybak Leningrada' (now known as MFV 'North Star') & another*¹ a dispute arose as to the ownership of a fishing vessel. The High Court dealt with the question of the presumption as follows:

'It is common cause that at the time of the arrest of the vessel she was in the possession of Lenrybprom. As a rebuttable presumption of law exists that the possessor of a movable thing is also the owner thereof the burden of proof was on the applicant to rebut this presumption of ownership arising from the possession.'

[16] I thus now turn to the evidence to ascertain whether the appellant established that it was in possession of the helicopter when the alleged negligent conduct of the respondent occurred.

[17] The fact that the name of the appellant is Bateleur Helicopter CC and that its place of business was in Swakopmund is common cause. It is also common cause that the respondent gained access to the helicopter that forms the subject matter of the dispute at the Swakopmund Airport. Mr Swart testified that he was the sole member of the appellant. He was contacted on the day of the incident on his farm in the Gobabis district by appellant's operational manager stationed in Swakopmund in respect of the use of one of the appellant's helicopters for a flight test. He testified that the appellant was the owner of the helicopter. That this happened is not disputed.

[18] It does seem that Mr Swart was not properly prepared for this ownership issue, as his evidence to some extent is somewhat confusing, as he in the same breath as stating that appellant was the owner of the helicopter states that he gave permission

¹ *Marine Time Company Incorporated v MFV 'Rybak Leningrada' (now known as MFV 'North Star') & another* 1996 (NR) 162 (HC) at 165.

for the use of 'my' helicopter. He seems to thought that because he was the sole member of the appellant, the helicopter belonged to him. If regard is had to the documentation handed in as exhibits at the trial it does appear that those involved with the repair of the damages on the helicopter all realised that this helicopter belonged to Bateleur Helicopters CC as the name occurs in all the tax invoices and job cards involved. Further as pointed out above, the authorisation to use the helicopters was initially sought from appellant's operational manager.

[19] The evidence of Mr van Schalkwyk who accompanied the respondent when the alleged negligence occurred was to the effect that the helicopter originally arranged for the flight was unavailable at the airport (this is common cause), but that the 'plaintiff' had a similar helicopter parked at 'the airfield' and that after arrangements were made with the 'plaintiff' the 'plaintiff' agreed to the use of the helicopter relevant to this matter. The 'plaintiff' was, of course, the current appellant.

[20] The respondent in his evidence-in-chief testified that the flight instructor made arrangements with (Mr Swart), 'a representative of the plaintiff. So, that I may use their helicopter situated at Swakopmund airfield for my test flight'.

[21] In my view the evidence clearly established that the appellant was in possession of the helicopter involved at all relevant times to this matter. It thus follows that there was an *onus* in this regard to rebut this presumption which in my view a mere indication from the respondent's lawyer that he required documentary evidence of the ownership cannot do.

Conclusion

[22] It follows that the appeal must succeed and that the finding of lack of *locus standi* will have to be set aside and the matter will have to be referred back to court *a quo* to be finalised.

[23] Rule 11(8) of this Court stipulates that, 'unless it is essential for the determination of the appeal the record must not contain', any orders, discovery affidavits and documents not proved or admitted. Appellant's legal practitioner chose to ignore this rule and at least one of the five volumes of the record filed in this Court contained matters that should not have formed part of the record. Thus, discovery of both parties are included and so are witness statements that were filed in the form of affidavits. A trial involves *viva voce* evidence by witnesses that is recorded. This is all that should be in the record, unless those witness statements were handed in as exhibits. In this matter certain attachments to those affidavits which were not even handed in as exhibits are referred to in the heads of argument of the appellant. This cannot be done and these documents were ignored by me. An appeal is determined on the record and not on the basis of everything that might have appeared in the court file prior to trial. This aspect in respect of what a record must contain and not contain had been addressed in a number of decisions in this Court and it is surprising and unacceptable that this rule is still not adhered to.

[24] As appellant's legal practitioner has indicated in his address to this Court that the parties have agreed that the appellant would not seek any cost order in respect of this appeal, I do not take this matter further except to state that but for this agreement, I would have given some adverse cost order in respect of this failure on behalf of the appellant to discourage the continued non-compliance with the provisions of this rule.

Order

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

1. The appeal succeeds and the judgment of the court *a quo*, dated 28 February 2023 and finding that the appellant did not establish its *locus standi* to institute the action, is set aside.
2. The matter is referred back to the court *a quo* for further judicial case management in order to finalise the matter.
3. There is no order as to the costs of this appeal.

FRANK AJA

ANGULA JA

SMUTS AJA

APPEARANCES

APPELLANT:

P Swanepoel

Instructed by Philip Swanepoel Legal
Practitioners

RESPONDENT:

A P L Brendell

Instructed by Shikongo Law
Chambers