IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: A 80/2014

In the matter between:

CREDIT EUROPE BANK N.V	**Applicant**
and	
MV TARIK III"	**Respondent**
BUNKERNET LIMITED	**Intervening Party**

JUDGMENT

Delivered on: 5 : 12 : 14

PLOOS VAN AMSTEL J

[1] This is an application for an order in terms of section 9(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983 for the sale of a ship, the MV Tarik III, including her equipment, furniture, stores, bunkers and lubricating oils. The ship has been arrested in actions *in rem* in this court at the instance of the applicant, the intervening party and a number of other creditors. It has also been arrested by way

of security in terms of section 5(3) of the Act. It is currently berthed in the port of Durban.

[2] The applicant, Credit Europe Bank NV, seeks the sale of the ship *pendente lite*, while the intervening party has obtained a judgment against the ship and wants it satisfied. The Uniform Rules pertaining to the execution of judgments do not apply to actions *in rem*[1], with the result that a creditor armed with a judgment *in rem* has to approach the court for an order that the *res* be sold.

[3] Section 9(1) provides as follows:

'A court may in the exercise of its admiralty jurisdiction at any time order that any property which has been arrested in terms of this Act be sold.'

Sub-section (2) provides:

'The proceeds of any property so sold shall constitute a fund to be held in court or to be otherwise dealt with, as may be provided by the rules or by any order of court'.

[4] Section 10A provides that the court may make an order with regard to the distribution of such a fund or payment out of any portion of the fund or proof of claims against the fund, including the referring of any of or all such claims to a referee, in terms of section 5(2) (e), to receive, examine and report to the court on the validity and ranking of claims against the fund.

[5] The effect of such an arrangement therefore is that the ship is sold and that claims against it proceed against the fund which has taken its place.

[6] The ship is owned by Garanti Finansal Kiralama AS, a Turkish financier, who advanced the funds for its acquisition and retained ownership of it pending repayment of the money. Garanti concluded a demise charter in respect of the ship with Hazar Denizcilik Ic ve Dis Ticaret in February 2011, whose rights and obligations in terms of the charterparty were transferred to Caliskan Ic ve Dis Tic San AS, a Turkish company, in January 2014. Caliskan was therefore the charterer by demise at the time of the arrests.

[1] Rules 24 and 21(9) of the Admiralty Rules.

[7] The applicant is a company based in the Netherlands. It arrested the ship on 26 May 2014 for the purposes of an action *in rem*, in pursuance of a claim for US$ 5 181 471 against Caliskan. It did so pursuant to section 1(3) of the Act, which provides that for the purposes of an action *in rem* a charterer by demise shall be deemed to be, or to have been, the owner of the ship for the period of the charter by demise.

[8] The intervening party is Bunkernet Ltd, which has obtained a judgment against the ship in the sum of US$ 56 849 in respect of marine gasoil supplied to it. Its application to intervene was not opposed and I propose to grant it.

[9] The application for the sale of the ship is opposed by Garanti. Caliskan applied for the arrests to be set aside but its attorneys of record withdrew on 4 August 2014, after the answering affidavits were delivered, and it has done nothing further to pursue that application.

[10] The main basis on which Garanti opposes the sale of the ship is that this will amount to an arbitrary deprivation of its property, which is prohibited by section 25(1) of the Constitution[2]. The sub-section provides as follows:

'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property'.

[11] Garanti's complaint is that none of the arresting creditors has a claim against it and that the ship has been arrested on the basis of claims *in personam* against the charterer by demise. It says the sale of its ship to satisfy claims against the charterer cannot be justified and will be arbitrary, within the meaning of that expression in section 25(1).

[12] It must be plain that the sale of the ship will amount to the deprivation of Garanti's property. That will be so irrespective of the success or otherwise of the claims against the ship. If a claim succeeds it will be paid out of the fund constituted by the sale of the ship, in other words out of Garanti's pocket. If all the claims fail

[2] Constitution of the Republic of South Africa, 1996.

Garanti will receive the money in the fund, but it will still have been deprived of its ship.[3]

[13] The Admiralty Jurisdiction Regulation Act is a law of general application. Section 3(4) (b) provides that a maritime claim may be enforced by an action *in rem* if the owner of the property to be arrested would be liable to the claimant in an action *in personam* in respect of the cause of action concerned. This is uncontentious. It is section 1(3) which, according to Garanti, causes the problem. The sub-section provides that for the purposes of an action *in rem* a charterer by demise shall be deemed to be, or to have been, the owner of the ship for the period of the charter by demise. The creditors relied on this section in arresting the ship on the basis of claims *in personam* against the demise charterer.

[14] The deeming provision in section 1(3) is not one that can be rebutted. The demise charterer is not deemed to be the owner unless the contrary is proved. It is a given that it is not the owner of the ship.[4] The effect of the deeming provision is that, for the purposes of an action *in rem*, the demise charterer is taken to be the owner, although it is not. And in terms of section 9 the arrested ship can be sold so as to satisfy the claims of the creditors. That means that the owner's ship can be sold in satisfaction of claims against the demise charterer.

[15] This is precisely what Garanti contends offends against the prohibition against the arbitrary deprivation of property in section 25(1) of the Constitution. It however does not contend that any of the sections in the Act to which I have referred are unconstitutional. It merely contends for an interpretation of the sections which does not offend against the Constitution.

[16] Counsel for Garanti submitted that section 9 must be interpreted in such a way that it does not permit the sale of a ship which has been arrested unless the arrest was based on a claim *in personam* against the owner.[5] Section 39(2) of the Constitution provides that when interpreting any legislation every court must promote

[3] Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others 2011 (1) SA 293 para 38.
[4] See the MT Rio Caroni: CH Offshore Ltd v PDV Marina SA And Others (A113/2013) [2013] ZAKZDHC 62 (5 November 2013).
[5] The submission was made in the context of the facts of this case, and did not apply to maritime liens.

the spirit, purport and objects of the Bill of Rights. In *National Coalition For Gay & Lesbian Equality And Others v Minister of Home Affairs*[6] Ackermann J said:

'There is, it is true, a principle of constitutional interpretation that where it is reasonably possible to construe a statute in such a way that it does not give rise to constitutional inconsistency, such a construction should be preferred to another construction which, although also reasonable, would give rise to such inconsistency. Such a construction is not a reasonable one, however, when it can be reached only by distorting the meaning of the expression being considered'.

[17] In *Mateis v Ngwathe Plaaslike Munisipaliteit En Andere*[7] the court held that the interpretation contended for in that case would constitute amending the Act and not interpreting it. Olivier JA held that a court did not have such power in a case where the constitutionality of the relevant statutory provision was not in dispute, nor where the interpretation of the Act under consideration allowed no room for doubt.

[18] It seems to me that the interpretation contended for by Garanti is irreconcilable with the wording of the sections under consideration. The deeming provision in section 1(3) is expressly stated to be for the purposes of an action *in rem*. In this context a charterer by demise is deemed to be the owner of the ship. The effect of this section, read with sections 3(4) (b) and (5) is that a maritime claim may be enforced by an action *in rem* if the demise charterer of the property to be arrested would be liable to the claimant in an action *in personam*, and the action shall be instituted by the arrest of the ship or the other property specified in sub-section (5). An interpretation of section 9(1) that a court may not order that a ship which has been arrested in an action *in rem* be sold unless the claim *in personam* lies against its owner is inconsistent with these provisions. It will negate the deeming provision in section 1(3). And what is the point in allowing an action *in rem* against the ship based on a claim *in personam* against the demise charterer if the ship cannot be sold?

[19] The interpretation contended for is not a reasonable one, having regard to the wording of section 9(1) read with section 1(3). It will amount to amending the Act,

[6] 2000 (2) SA 1 (CC) para [23]
[7] 2003 (4) SA 361 (SCA)

which is not permissible in the absence of a constitutional challenge against the sections concerned.

[20] It seems doubtful in any event that the sale of a ship in satisfaction of debts incurred by its demise charterer, relating to the ship, will amount to the arbitrary deprivation of property. In the applicant's replying affidavit its attorney states that the deeming provision in section 1(3) is similar to provisions incorporated in the national law of many countries around the world and have been a feature of international maritime law for some considerable time. This was not disputed before me. The 1952 International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships provides as follows in Article 3(4):

'When in the case of a charter by demise of a ship the charterer and not the registered owner is liable in respect of a maritime claim relating to that ship, the claimant may arrest such ship or any other ship in the ownership of the charterer by demise, subject to the provisions of this Convention, but no other ship in the ownership of the registered owner shall be liable to arrest in respect of such maritime claim.'

[21] Article 3(1) (b) of the International Convention on the Arrest of Ships, held at Geneva on 12 March 1999, provides:

'Arrest is permissible of any ship in respect of which a maritime claim is asserted if: ...

(b) the demise charterer of the ship at the time when the maritime claim arose is liable for the claim and is the demise charterer or owner of the ship when the arrest is effected;... '

[22] The commercial connection between the owner and the demise charterer is a close one. The owner allows the charterer to use the ship for the duration of the charter as if it is the owner. It is the charterer who employs the Master and the crew and who decides where the ship will go and what she will carry, and it is the charterer who contracts with the shippers of cargo and the suppliers of goods to the ship. Ship owners know that the ship can be arrested for certain liabilities of the demise charterer, who indemnifies the owner against this eventuality. The provisions in the Admiralty Jurisdiction Regulation Act in this regard are aimed at assisting creditors to obtain payment of what is due to them without difficulties relating to jurisdiction and security for their claims. Wallis, in *The Associated Ship &*

South African Admiralty Jurisdiction,[8] expresses the view that section 1(3) will pass constitutional muster if it is not applied to associated ships. I need not say anything further about this aspect of the matter in the light of my finding that the interpretation contended for by Garanti is not permissible, and the absence of a constitutional challenge to sections 1(3) and 9(1).

[23] This brings me to the exercise of my discretion, which, in the case of a sale *pendente lite*, is a wide one.[9] The applicant's claim is not in issue on the papers before me[10], so I will deal with it briefly. The applicant lent a sum of USD$ 4 million to a company called Horizon Trading S.A. to finance the purchase of coal. Horizon nominated the MV Tarik III as the ship for the carriage of the coal from Durban to Iskenderun in Turkey. The bills of lading were issued with the applicant as consignee, so as to provide security for the loan, and it held the originals. At that time the demise charterer of the ship was Hazar. As I have said, its rights and obligations in terms of the charterparty were later transferred to Caliskan, which was also a guarantor in respect of the loan to Horizon. The applicant lost its security when the coal was discharged and fraudulently delivered to Caliskan, instead of to the applicant, and the loan remains unpaid. The applicant claims to have an action *in rem* against the ship on the basis that it has a claim *in personam* against Caliskan as the demise charterer. The claim is for US$ 5 181 471, which is said to have been the market value of the coal, alternatively the sum of US$ 4 150 883, being the amount owed in terms of the loan agreement. The applicant has no security for its claim, other than the ship itself.

[24] The basis on which the applicant contends that the ship should be sold *pendente lite* and replaced by a fund can be stated as follows. It has been under arrest since 26 May 2014. It has no cargo on board and Caliskan appears to have abandoned it. Caliskan is in arrears with the payment of hire charges under the charterparty to the tune of more than US$ 10 million, and for the last few months it has not paid the crew, the port fees and agency costs, nor has it paid for the fuel required for the safekeeping and maintenance of the ship. Caliskan is currently under bankruptcy protection in Turkey. Garanti has also not paid any of these costs,

[8] 289 – 292
[9] MV Spirit of Namibia: Big Red One Inc And Another v Marco Fishing (Pty) Ltd 2006 (6) SA 309 (SCA) para 11.
[10] Subject to Garantie's special plea that the action should be stayed pending arbitration in London.

nor is it willing to provide security for the applicant's claim so that the ship can be released. It has therefore fallen on the sheriff of this court to procure and pay for supplies to the ship and pay the crew. The cost of bunkers is in the region of US$ 40 000 per week. Pursuant to an application brought by the sheriff the applicant was ordered to pay an amount in excess of US$ 300 000 to the sheriff in respect of the cost of preserving the ship, which will cover the expenses until the end of November 2014. The preservation costs are mounting and ongoing. The wages of the crew are said to be about US$ 77 000 per month. The total value of the claims against the ship exceeds her value, which will continue to diminish while she lies idle. The mounting cost of preserving the ship is therefore not merely reducing the owner's equity in the ship, it is diminishing the creditors' security for their claims. The action instituted by the applicant is unlikely to be finalized before the end of next year. By then the cost of preserving the ship will be substantial, which will be a first charge against her. Apart from the applicant's arrest the ship has been arrested by three other creditors, all of whom support the sale of the vessel.

[25] In *Unicorn Lines (Pty) Limited v MV Michalis S*[11] Hugo J said that in relation to arrests and sales the object of the Act is to give to maritime claimants a form of security in advance of the adjudication of their claims. The courts must therefore, in so far as it is in their power, attempt to preserve that security. If the claims are equal to or in excess of the value of the ship, and the costs of maintaining the ship under arrest and the deterioration caused by the arrest are such as to materially reduce the security held by the claimants, that would be a valid and weighty consideration in favour of a sale. In such a case the wishes of the owner may well have to yield to the policy underlying the Act.

[26] In *MV Spirit of Namibia: The Big Red One Inc v Marco Fishing (Pty) Ltd*[12] Scott JA said the length of time a vessel is likely to be detained and the costs involved in maintaining the vessel are often decisive in determining whether a sale *pendente lite* should be ordered. He referred to *The Myrto*[13], where Brandon J considered that an anticipated delay of a further eighteen months, after the vessel had already been under arrest for three months, and the costs involved in

[11] 1990 (3) SA 817 D & CLD at 821.
[12] 2006 (6) SA 309 (SCA) para 14.
[13] [1977] 2 Lloyd's Rep 243 (QB Adm Ct) at 260.

maintaining the vessel during that period justified a sale *pendente lite*. The learned judge characterised an argument resisting the sale in such circumstances as lacking reality.

[27] The intervening party is in a different position. It does not seek the sale of the ship *pendente lite*. It seeks satisfaction of the judgment in its favour. The judgment was obtained pursuant to an action *in rem* where neither the ship nor its owner or the demise charterer entered an appearance to defend. In those circumstances the judgment can only be enforced against the ship. See *The Nordglimt*[14] where Hobhouse J said:

'Unless and until anyone appears to defend an action in rem, the action proceeds solely as an action in rem and any judgment given is solely given against the res...'

This statement was quoted with approval by Wallis JA in *MV Alina II (No 2) Transnet Ltd v Owner of Alina II*[15]. Also see Hofmeyer, *Admiralty Jurisdiction, Law and Practice in South Africa* 2nd ed at 113:

'Where there is no intervention in an action in rem the position is straightforward. The action is one against the res and the res represents the limit of liability.'

[28] A court's discretion to order the sale of a ship in satisfaction of a judgment seems to me to be not as wide as in the case of a sale *pendente lite*. Different considerations apply. The starting point must be that a creditor armed with a judgment is entitled to execute on it. That is part of the rule of law.[16] A judgment *in rem* against the ship can only be enforced against the ship. If neither the owner nor the demise charterer is willing to pay the judgment it seems to me that a court has little choice but to order that the ship be sold. There may be cases where a court will decline to do so, for example where the owner requests a reasonable period to make arrangements for the payment of the debt. That is not the case here, and Bunkernet has a judgment in an amount which is not trifling. It is entitled to expect that the court will give effect to its judgment.

[29] Counsel for Garanti urged me, if I make an order for the sale of the ship, to suspend the order until Caliskan comes out of the bankruptcy proceedings in Turkey

[14] [1988] 2 All ER 531 (QB) at 545e-g,
[15] 2011 (6) SA 206 (SCA) at para [23]
[16] Also see *MT Argun v Master And Crew of the MT Argun And Others* 2004 (1) SA 1 (SCA) para's 36-37.

in March 2015. I see no basis for doing so. There has been no suggestion that Caliskan is willing to pay the debt, or that it will be able to do so. Nor is there any indication on the papers as to whether it is likely to survive the bankruptcy proceedings. The judgment in favour of Bunkernet is in any event not enforceable against it.

[30] Counsel also suggested that I consider suspending any order for the sale of the ship for two weeks so as to give Garanti time to decide whether it wants to pay the judgment debt. I am entirely unsympathetic to this request. Garanti has had ample time to pay the judgment debt if it wanted to avoid the sale of its ship. It is indemnified by Caliskan and would have been entitled to recover the amount paid from it.

[31] I therefore propose to make an order for the sale of the ship and the creation of a fund as contemplated in section 9(2). I do so pursuant to the applications by both the applicant and the intervening party. I was asked to order that the costs order made in favour of the intervening party in case A 61/2014 includes an order for payment of the costs of preserving the vessel and the remuneration of the Sheriff. This was the action in which the default judgment was obtained. I am not persuaded that I should so. Whether or not the order includes those expenses is a matter of law. If it does then I do not have to say so. If it does not then I cannot change the order.

[32] The order which I make is as follows:

There will be an order granting leave to intervene, and for the sale of the ship and the associated property, in terms of the draft order marked X and initialled by me.

PLOOS VAN AMSTEL J

Appearances:

For the Applicant	:	Adv. S. Mullins SC & Adv. L Mills
Instructed by	:	Bowman Gilfillan Inc. Durban
For the Respondent	:	Adv. D Gordon SC
Instructed by	:	Cox Yeats Attorneys Durban
For the Intervening Party	:	Adv. C J Pammenter SC
Instructed by	:	Webber Wentzel Attorneys c/o Goodrickes Durban
Date of Hearing	:	25 November 2014
Date of Judgment	:	05 December 2014