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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO.: AR154/2015
CASE NO.: A87/2014

NAME OF SHIP : **MV "TARIK III"**

In the matter between :

CREDIT EUROPE BANK N.V. **APPELLANT**

and

THE SHERIFF, DURBAN COASTAL **RESPONDENT**

JUDGMENT
Delivered on : FRIDAY, 12 FEBRUARY 2016

OLSEN J (KOEN J et HENRIQUES J concurring)

[1] On 24 October 2014 Mokgohloa J, sitting at Durban and exercising admiralty jurisdiction, granted an order declaring the appellant, Credit Europe Bank N.V., liable for the reasonable costs incurred by the respondent, the Sheriff, Durban Coastal, in preserving the MV "Tarik III" which was under arrest at the instance of, inter alia, the appellant. The learned Judge directed the appellant to pay expenses incurred to date in the sum of USD85,049 as well as projected expenses of USD297,215, within five days of the date of her order. One or two ancillary orders were also made, and in

particular an order that the appellant should pay the costs of the application on the scale as between attorney and client.

[2] With the leave of the court *a quo* the appellant appeals against the order which directed it to pay the projected expenses of preservation of the vessel, and the costs of the application; and in particular, as it turns out, the order that such costs should be on the scale as between attorney and client.

[3] Only the appellant delivered heads of argument. A little less than a week before the appeal was to be heard the respondent's attorney delivered a letter recording that the dispute between the parties had long since been resolved because the costs of preservation had been paid and the vessel indeed sold. The letter went on to say, in effect, that to the extent that there might be a concern that the judgment of the court *a quo* would stand as a precedent for the proposition that a Sheriff may claim preservation costs in advance of expenditure of the sums in question, the respondent abandoned that portion of the judgment. Otherwise the respondent abides the decision of this court. On receipt of this letter the Judge presiding in this appeal notified the appellant that it should prepare to address the court fully on s16 (2) of the Superior Courts Act, 2013, and the appropriate order as to the costs of the appeal should it be dismissed for being moot; and invited the respondent's attorneys to make any submissions considered necessary on the question of the costs of the appeal, which had not been dealt with in the letter which brought to our attention that the issue as between the parties had become moot. The response from both parties is that if the appeal should be dismissed for being moot, there should be no order as to the costs of the appeal.

[4] Section 16 (2) (a) of the Superior Courts Act, 2013 provides as follows.

> "(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

> (i) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs."

[5] The principal issue in this appeal is the order made by the court *a quo* that preservation expenses which were then prospective should be paid. The respondent asserted and the appellant denied the latter's liability to make that payment. A decision made now on appeal either to uphold or set aside that order would have no practical effect or result as all preservation costs have long since been paid and refunded. The issue has become academic. There is no longer any *lis* between the parties as to the appellant's liability to pay the amounts in question.

[6] To borrow words from paragraph 18 of the judgment of Ponnan JA in *Legal Aid South Africa v Magidiwana and Others* 2015 (2) SA 568 (SCA), costs aside, the outcome of the appeal on the merits would be a matter of "complete indifference" to both parties. As to what is meant by that, I can do no better than to refer to the cases cited, and the passages quoted from them, in paragraph 18 of the judgment in *Legal Aid South Africa*.

[7] Counsel for the appellant seeks to distinguish this case upon the basis that it raises a "discreet legal issue of public importance" which would affect matters in the future. These words are found in paragraph 5 of the judgment of Wallis JA in *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Limited and Others* 2013 (3) SA 315 (SCA). The appeal in that case concerned the disclosure of a report ordered under the provisions of PAIA. The report was disclosed in compliance with the order, as a result of which, like here, as between the parties the appeal would have no practical effect or result. Paragraph 5 of the judgment in *Qoboshiyane* continues as follows.

> "In the circumstances this court may dismiss the appeal on that ground alone. The court has a discretion in that regard and there are a number of cases where, notwithstanding the mootness of the issue as between the parties to the litigation, it has dealt with the merits of an appeal. With those cases must be contrasted a number where the court has refused to deal with the merits.

> The broad distinction between the two classes is that in the former a discreet legal issue of public importance arose that would affect matters in the future and on which the adjudication of this court was required, whilst in the latter no such issue arose. In exercising its discretion the court is always mindful of the wise words of Innes CJ in *Geldenhuys and Neethling v Beuthin* [1918 AD 426 at 441] that :
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> 'After all, Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon different contentions, however important.'"

[8] The example which the appellant would have us follow is *The Merak S : Sea Melody Enterprises SA v Bulktrans (Europe) Corporation* 2002 (4) SA 273 (SCA). In that matter the appellant's vessel had been arrested as security for claims which the respondent intended pursuing in arbitration. The appellant had provided a bank guarantee to secure the release of the vessel and subsequently applied for a reduction in the amount of the bank guarantee. That application was dismissed. As it turned out the respondent decided not to proceed with the arbitration and, in the result, after leave to appeal had been granted, the appellant obtained an order for the return of the guarantee. The principal question in the dismissed application for a reduction in the amount of the guarantee was as to whether a bank guarantee was to be regarded as "security" that might be reduced in terms of s5 (2) (d) of the Admiralty Jurisdiction Regulation Act, 1983. The judgment of the appeal court was sought, notwithstanding that as between the parties the issue had become moot, as it would resolve a discreet legal question as to whether such a guarantee could be classified as "security" as contemplated by the Act. The court entertained the appeal. The reason for doing so was explained in paragraph 4 of the judgment as follows.

> "In view of the importance of the questions of law which arise in this matter, the frequency with which they arise and the fact that at the time of the decision in the court *a quo* and of the granting of leave to appeal those questions were, as Mr Shaw for the appellant put it, "live issues", I am satisfied that this is an appropriate matter for the exercise of this court's discretion to allow the appeal to proceed:: ..."

[9] The application made in this case by the respondent was one in terms of s5 (2) (c) of the Admiralty Jurisdiction Regulation Act, which provides as follows.

> "A court may in the exercise of its Admiralty Jurisdiction –
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> ...
>
> (c) order that any arrest or attachment made or to be made or that anything done or to be done in terms of this Act or any order of the court be subject to such conditions as to the court appears just, whether as to the furnishing of security or the liability for costs, expenses, loss or damage caused or likely to be caused, or otherwise;".

[10] The principle submission of the appellant in support of the proposition that this appeal raises a discreet legal issue is that the respondent is erroneously of the view that a claim for projected costs of preservation is a logical extension of the orders made (against arresting creditors to make good expenses incurred by the sheriff) in the *MT Argun* 2001 (3) SA 1230 (SCA). It is suggested that it can be expected that, in the light of the judgment of the court *a quo*, similar claims will be made by sheriffs in the future.

[11] One can but speculate on the question as to whether in the future arresting creditors are likely to be confronted with claims for payment in advance for preservation expenses. One would think that hitherto, and in the future, reasonable decisions have been and will be customarily made by arresting creditors, given their obligations with regard to the costs of preservation of arrested property, which avoid the need for any proceedings of the kind which served before the court *a quo*. The decision made in this case was very much fact based. The respondent (the Sheriff) set out a full account of how and over what period his requests for assistance with regard to preservation costs had been met with diversionary tactics. The respondent had already incurred preservation costs of some USD85 000, and was required urgently to replace the crew of the vessel and supply bunkers, the cost of which constituted the lion's share of the prospective expenses which the respondent sought to have paid. Those expenses had to be incurred as a matter of urgency. Assuming a discretion on the part of the court *a quo* to order the payment of such

prospective expenses, given the facts of the case one cannot help but have sympathy for the decision to make the order.

[12] I struggle to find the discreet legal issue in all of this. Section 5 (2) of the Admiralty Jurisdiction Regulation Act confers a discretion on the court to impose conditions which appear to be just, whether as to certain identified matters "or otherwise". Amongst the matters mentioned are the furnishing of security or liability for costs and expenses. The court in the *Argun* did not seek to define the ambit of that discretion insofar as it relates to prospective expenses. (It did note, in paragraph 16 of the judgment, that in the United States of America and Australia an arresting party is obliged to pay the marshal in advance, or furnish the marshal with an undertaking to pay expenses on demand. The same position apparently obtained in New Zealand.) In my view there is no similarity between the discreet legal question which was considered in the *Merak S*, and the invitation which the appellant would like us to accept, that we should consider the question as to whether the discretion given to the court under s5 (2) (c) of the Act does not extend so far as to permit of an order for payment of expenses about to be, but not yet actually incurred, despite the fact that a court may consider it just to make such an order. As said by Friedman AJP in *Pienaar v Thusano Foundation and Another* 1992 (2) SA 552 (BGD) at 580, the word "just" means, inter alia, "correct, appropriate, fair-minded, sound, deserved, fitting, reasonable, justified…". That signifies the range of orders which might fall within the section. A contention that a claim for future preservation expenses lies beyond the wide reach of the section can hardly be classified as a discreet legal issue.

[13] The appellant advances an alternative argument in support of its contention that the appeal is not moot. In terms of s16 (2) (a) (ii) of the Superior Courts Act the court may have regard to considerations of costs in determining whether an appeal is moot where exceptional circumstances justify that approach. It is argued that the learned Judge in the court *a quo* failed to exercise a judicial discretion in making the order that the appellant should pay the costs of the application on the attorney and client basis. The appellant relies on the following passage in the judgment of Cloete JA in *Naylor and Another v Jansen* 2007 (1) SA 16 (SCA) at para 10.

> "I had occasion in *Logistic Technologies (Pty) Ltd v Coetzee and Others* [1998 (3) SA 1071 (WLD)] to express the view that a failure to exercise a judicial discretion would (at least, usually) constitute an exceptional circumstance. I still adhere to that view – for, if the position were otherwise, a litigant adversely affected by a costs order would not be able to escape the consequences of even the most egregious misdirection which resulted in the order simply because an appeal would be concerned only with costs; and that, obviously, cannot be the effect of this section."

[14] The order made in the court *a quo* was the same order as that of which the appellant was given notice in the founding papers. Insofar as costs were concerned the order sought in the notice of motion was costs on the scale as between and client. Nothing was said in the founding affidavit specifically about the scale of costs which had been claimed. (I would have thought that it would have been obvious to the appellant when considering the founding papers that the sheriff sought a full indemnity as to costs at least on the ground that he was compelled to approach the court in order to be placed in a position where he could perform the obligations imposed on him as an officer of the court by reason of the appellant's arrest of the vessel in question.) The application was launched as an urgent one on 21 October 2014. A short answering affidavit was submitted on 23 October 2014. It contained four paragraphs stating the basis upon which the appellant contended that the application should not be granted. Its final paragraph warned that if the respondent persisted with the application the appellant would seek an order of costs against the respondent. The affidavit contained no objection to the proposition that if costs were to be awarded to the respondent, they should be on the scale as between attorney and client.

[15] The matter was then argued on 24 October 2014. As it turns out the transcript of the argument is part of the appeal record. No submission was made that the scale upon which the respondent sought costs was inappropriate. The subject of attorney and client costs was not discussed at all. The only submission on costs made by counsel then appearing for the appellant was that they should in fact be paid by the respondent, given the appellant's arguments (rejected by the court *a*

quo) that payment of future expenses could not be ordered, and that the matter was not urgent.

[16] As often happens in urgent applications, the judgment was brief. The learned Judge expressed her view that the matter was indeed urgent and that the sheriff had made out a case for the relief sought. She made no comment or observation with regard to the fact that the order she granted included an order for costs on the scale as between attorney and client.

[17] In my view there is no merit in the appellant's contention that the circumstances set out above justify drawing a conclusion that a judicial discretion was not exercised on the question of the scale of costs. Costs on that scale were claimed from the outset. No objection to the scale was raised. There was accordingly no need for the learned Judge to mention why she thought the scale appropriate. This is especially so when one considers the circumstances in which she had to make her decision.

[18] As to the costs at stake if we should consider them on appeal, the issue raised by the appellant is as to the difference between attorney and client costs and party and party costs in an opposed application where all the affidavits (excluding annexures) amount to some 38 pages, and the transcribed argument to some 17 pages. There is nothing exceptional, let alone egregious, about the order. (Cf. *Oudebaaskraal (Edms) Bpk v Jansen van Vuuren* 2001 (2) SA 806 (HHA) at 812 D-F, where costs were brought to account. They were incurred in a matter which generated a 35 volume appeal record.)

[19] I conclude, accordingly, that the provisions of s16 (2) (a) of the Superior Courts Act apply in this case.

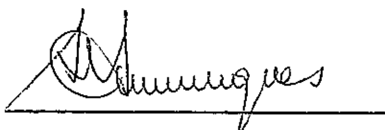
The following order is made.

1. The appeal is dismissed.

2. There is no order as to costs of the appeal.

OLSEN J

KOEN J



HENRIQUES J

Date of Hearing:	WEDNESDAY, 01 FEBRUARY 2016
Date of Judgment: :	FRIDAY, 12 FEBRUARY 2016
For the Appellant :	MR S R MULLINS SC with MS S LINSCOTT
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For the Respondent:	NO APPEARANCE
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