REPORTABLE

CASE NO. SA 2/2010

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

INTERNATIONAL UNDERWATER SAMPLING LTD	**FIRST APPELLANT**
THE MOTOR VESSEL "THE EXPLORER"	**SECOND APPELLANT**

and

MEP SYSTEMS PTE LTD	**RESPONDENT**

Coram: Mainga, JA, Chomba, AJA, *et* Mtambanengwe, AJA

Heard on: 23/06/2010

Delivered on: 05/11/2010

APPEAL JUDGMENT

CHOMBA, AJA:

[1] This is an out-of-the-ordinary suit by reason of the fact that the cause of action occurred beyond the territorial jurisdiction of the courts of this country and that the parties involved are all *peregrine.* The first appellant, International Underwater Sampling Ltd (IUS Ltd), is a limited company which has its registered office in the Bahamas, West Indies, and is the owner of the second appellant ("The Explorer"), which flies a flag of St. Vincent and the Grenadines, while the cause of action occurred in Singapore. The respondent, MEP Systems Pte Ltd (MEP Pte

Ltd), is a private company with its registered office in Singapore. The action was, however, commenced in the court *a quo* because that court was conferred with jurisdiction by virtue of an interaction of three English enactments, namely the Colonial Courts Admiralty Act, 1890 (53 & 54 Vict.) (the 1890 Act), the Admiral Court Act, 1840 (3 & 4 Vict. c. 65) (the 1840 Act) and the Admiralty Court Act, 1861, (24 Vict. c. 10) (the 1861 Act). (see *Freiremar SA v Prosecutor-General of Namibia and Another* 1996 NR 1 (HC); *Namibia Ports Authority v MV "Rybak Leningrada"* 1996 NR 355).

[2] The brief circumstances which triggered the appeal to this Court were the following. The respondent, the plaintiff in the court *a quo,* issued a summons *in rem* against "The Explorer" and the IUS Ltd. as owners of the vessel, and in consequence thereof caused "The Explorer" to be arrested under warrant. The plaintiff's claim was for a sum of US$644,503.00, being the alleged unpaid balance of the price of goods sold and delivered to IUS Ltd. The institution of that action prompted the IUS Ltd to launch an application by notice of motion by which it prayed that the summons *in rem* be set aside and the vessel be released from arrest, or that the court *a quo* grant such other alternative relief, including a stay of the proceedings *in rem* and release of the vessel from arrest. The motion proceedings before Parker, J, resulted in the motion being dismissed with costs. It was from that decision that this appeal emanated.

Brief Facts Giving Rise to the Dispute

[3] It is common ground that the parties entered into a written contract on 21 September 2007 in Singapore. The contract is evidenced by the document titled

"Sales Contract for MET Deck Machinery", marked "NTP-1" in the Court below. By virtue thereof the respondent delivered to the first appellant equipment described by the respondent as deck machinery, but those acting for the defendants in the Court *a quo* preferred to describe it as equipment designed to convert the vessel to undertake seabed mineral sampling. However, the contract document reflects the equipment as consisting of the following:

> 1 set of Constant Tension Main Hoist Winches, each set consist of: 2 x Hoist Winches equipped with spooling gear; 2 x Local Control; 2 x Remote Control; 2 x Load Pin 200T; 1 x Power Pack.
>
> 1 set Constant Tension Guide Winches, each consist of: 2 x Constant Tension Guide Winches; 2 x Local Control; 2 x Remote Control; 2 x Tension meter; 1 x Power Pack.
>
> 1 set Slurry Hose Constant Tension Spooler, each set consist of: 1 x Slurry Hose Spooler; 1 x Local Control; 1 x Remote Control; 1 x Power Pack.
>
> Vertical sheaves.
>
> Galvanized Lubricated Steel Wire Rope.

In respect of each set of equipment there are shown the necessary specifications as well as ancillary requirements. Despite initial misunderstanding, it is common cause that the equipment was delivered to the vessel while it was in Singapore. The equipment having been fitted to the vessel, it thereafter left the shores of Singapore, sailed to Cape Town in South Africa and thereafter to the west coast of Namibia where the vessel was to be used to undertake seabed mineral sampling.

It was while "The Explorer" was engaged in the mineral sampling that the action *in rem* was instituted and the vessel arrested.

[4] In the affidavit to lead warrant, Mr. Ng Tock Ping (Mr. Ping), the Managing Director of MEP PTE Ltd, deposed that his company had paid the supplier of the aforementioned equipment which he described as necessaries in terms of section 5 of the 1861 Act. However, in seeking the setting aside of the summons *in rem* and release of the vessel, Mr. Peter Looijen (Mr. Looijen), the Mechanical Engineer and Technical Director of IUS Ltd, by his founding affidavit, disputed the "necessaries" description tagged to the equipment. That was one of the moot points in the Court *a quo.* Unfortunately for the first appellant, that argument did not find favour with the learned trial judge, who determined that the goods afore listed were, according to the relevant law, necessaries. This point will be discussed at length later as it was relied on even during the hearing before this Court. Two other issues in dispute will be introduced presently.

The Issues in the Appeal

[5] This whole appeal revolves around three issues and these were hotly canvassed before us. They are the following:

1. Whether or not the equipment supplied by the respondent to the appellants and on which the summons *in rem* and the arrest of "The Explorer" were premised were, in terms of admiralty law, necessaries.

2. Whether or not the action *in rem* was instituted for the sole purpose of obtaining an award as security for arbitration proceedings to which, according to the contract subsisting between the parties, they had contractually agreed to have recourse in order to resolve any disputes arising from the contract.

3. Whether or not, before instituting the action *in rem,* the respondent had elected to go for, or had in fact commenced, arbitration proceedings.

I now intend to consider and resolve these issues individually and will do so starting with the third.

Whether the respondent had elected to initiate or had actually initiated Arbitration Proceedings before instituting the action *in rem.*

[6] As already stated, the parties entered into a contract of sale and purchase of the goods enumerated in paragraph [3] hereof. The contract contained an arbitration clause which provided as hereunder:

> "16. **Arbitration:** All disputes in connection with this contract or the execution thereof shall be settled friendly (*sic*) through negotiation within 60 days. In case no settlement can be reached within 60 days, the case shall then be submitted to Singapore International Arbitration Centre for arbitration in accordance with its rules and procedure of arbitration. The arbitration shall take place in Singapore and the arbitral award of the said arbitration commission is final and binding on both Parties. The arbitration fee shall be borne by the losing party."

[7] On April 21, 2009, that is before the institution of the action *in rem* and the arrest of the vessel, a letter emanating from the respondent's solicitors was sent to IUS Ltd marked for the attention of Mr. Looijen. Its text was framed in the following terms:

[8] "**NOTICE OF ARBITRATION: SALES CONTRACT DATED 21 SEPTEMBER 2007 FOR DECK MACHINERY SAMPLER SETTLER**

We are solicitors in Singapore, and we act for MEP Systems Pte Ltd.

We are instructed that by Sales Contract for MEP Deck Machinery dated 21 September 2007, our client agreed to sell and you agreed to purchase a number of deck machinery as particularized in the contract.

We are further instructed that disputes have arisen between our client and you in relation to the contract. In particular, our client has claims against you for payment of machinery amounting to about US$600,000.00 already delivered to you. On the other hand, you have alleged that our client has not delivered the machinery in accordance with the specifications/description.

Clause 16 of the Contract states as follows:

Arbitration: All disputes in connection with this contract or execution thereof shall be settled friendly through negotiation within 60 days. In case no settlement can be reached within 60 days, the case shall then be submitted to Singapore International Arbitration Centre for arbitration in accordance with its rules and procedure of arbitration. The arbitration shall take place in Singapore and the arbitral award of the said arbitration commission is final and binding on both Parties. The arbitration fee shall be borne by the losing party.

In view of the above, we are instructed to notify you that our client intends to refer the disputes to arbitration to the Singapore International Arbitration Centre. Please acknowledge receipt of this notice."

[9] Mr. Van Eeden, who appeared for the appellants in this court, presented a number of arguments the effect of which was that the respondent had made an election to go for arbitration in Singapore pursuant to the arbitration reproduced hereinbefore. His main pillar of argument in this regard was headlined thus: THE COURT HAS NO JURISDICTION IN A CLAIM FOR SECURITY AND THE ACTION *IN REM* CONSTITUTES AN ABUSE OF PROCESS UNDER CIRCUMSTANCES WHERE ARBITRATION PROCEEDINGS HAVE BEEN INITIATED. He then went on to submit that in paragraph 36 of the answering affidavit in the motion proceedings, it had been conceded on the respondent's behalf that the Court *a quo* had no jurisdiction to entertain an arrest for security in respect of arbitration proceedings which were to be carried on elsewhere. In aid of his contention Mr. Van Eeden cited the *dictum* of Robert Goff, L J, in "*The Tuyuti*" [1984] 2 All ER 545, and he quoted it comprehensively as follows:

> "I turn then to the central point in the case, which is concerned with the principle enunciated by Brandon, J, in The Rena K. The question of the Admiralty Court's jurisdiction to arrest a ship or to continue such an arrest in relation to arbitration proceedings was recently considered by this court in *The Andria* [1984] 1 All ER 1126, [1984] 2 WLR 570. It may help to put the principle in The Rena K in its context if I first refer to the judgment in *The Andria*. In that case it was held that, although the only prerequisite to the court's jurisdiction to issue a warrant for arrest is that a writ must have been issued in an action *in rem*, nevertheless the court should not exercise that jurisdiction for the purpose of providing security for an award which may be made in arbitration proceedings. The relevant passage in the judgment of the court in *The Andria* [1984]1 All ER 1126 at 1134 – 1135, [1984] 2 WLR 570 at 579 – 580 reads as follows: 'The mere fact that the dispute between the parties falls within the scope of an arbitration agreement entered into between them does not of itself generally preclude one of them from bringing an action.

Accordingly, the mere existence of an arbitration agreement will not of itself prevent a party from issuing a writ, or serving the writ and (in the case of an action *in rem*), procuring the arrest of the ship, or otherwise proceeding with the action. But the arbitration agreement can, of course, have certain consequences. For example, if an action is begun, the other party may apply for a stay of proceedings. Generally speaking, the court's power to grant a stay in such a case is discretionary; though of course in cases falling within s 1 of the Arbitration Act, 1975 the court is bound to grant a stay. Again, if a party actively pursues proceedings in respect of the same claim both in the court and in arbitration, his so proceeding may be regarded as vexatious and an abuse of the process of the court; if so, the court may, in the exercise of its inherent power, require him to elect in which forum he will pursue his claim: see The Cap Bon (1967) 1 Lloyd's Rep 543. Next, let it be supposed that, before the court has granted a stay of the proceedings under the Arbitration Acts, the plaintiff has obtained security by the arrest of a ship in an action *in rem*. If the stay is granted in the exercise of its discretionary power under s 4 of the Arbitration Act 1950, the court may require, as a condition of granting a stay, that alternative security should be made available to secure an award made in the arbitration proceedings: see The Golden Trader. If a mandatory stay is granted under s 1 of the Arbitration Act, 1975, no such term can be imposed. But it has been held by Brandon, J, that, where it is shown by the plaintiff that an arbitration award in his favour is unlikely to be satisfied by the defendant, the security available in the action *in rem* may be ordered to stand so that, if the plaintiff may have thereafter to pursue the action *in rem* (possibly using an unsatisfied arbitration award for the purpose of an issue *estoppel*) the security will remain available in that action: see The Rena K. (We have not had to consider the principle in that case, and we have not heard arguments on the point; however, we proceed on the basis that that principle is sound.) However, on the law as it stands at present, the court's jurisdiction to arrest a ship in an action *in rem* should not be exercised for the purpose of providing security for an award which may be made in arbitration proceedings. That is simply because the purpose of the exercise of the jurisdiction is to provide security in respect of the action *in rem,* and not to provide security in some other proceedings, e.g. arbitration proceedings. The time may well come when the law on this point may be changed: see s 26 of the Civil Jurisdiction and Judgments Act 1982, which has however not yet been brought into force. But that is not yet the law. It follows that, if a plaintiff invokes the jurisdiction of the court to obtain the arrest of a ship as security for an award in

arbitration proceedings, the court should not issue a warrant of arrest.'" (The underlining is mine)

[10] The learned counsel for the appellants consequently proceeded to argue that the Court *a quo* fell into error by not upholding the appellants' application to set aside the respondent's action *in rem* and to release "The Explorer". His reasoning for that assertion was that this was not a case where the court was asked to exercise its discretion to stay the action *in rem* by virtue of the arbitration clause. According to him this was neither a case where the court *a quo* needed to put the respondent to an election as to whether it should proceed in the arbitration or attempt to proceed in court. He asserted that this was a case where the respondent had already elected to proceed to arbitration proceedings, but was merely using the court below in order to obtain security for those proceedings. In the event, so he contended, that court was precluded from arresting the vessel pursuant to the purported action *in rem.* In that vein he further submitted that there was no provision in the 1840 Act or 1861 Act for the High Court to exercise such jurisdiction in any event. In support of his standpoint in this regard, he cited "The Andria"**,** *supra,* to which, as shown in the above quoted dictum, Goff, L J, made reference in delivering his judgment in "The Tuyuti"**,** *supra.*

[11] Before I ventilate my opinion on this argument by the appellants' counsel, it is opportune to reproduce paragraph 36 from Mr. Ping's answering affidavit in the aforementioned motion proceedings. The following is what he deposed:

"36 AD SUB-PARAGRAPH 21.10

> In-as-much as the last sentence of paragraph 16 of the affidavit to lead warrant is unclear, what I meant to convey was that by reason of the fact that the plaintiff has no security for any award that it might obtain in the arbitration proceedings, it had no alternative but to bring an action *in rem* against the vessel by its arrest and thereby obtain security for its claim. The plaintiff accepts that this court does not have the power to grant an order directing that any security furnished in the proceedings *in rem* before it should stand as security for an award in the arbitration proceedings in Singapore. Such security may only stand for a judgment given on the cause of action described in the action *in rem* made by this honourable court."

For a better appreciation of the above paragraph, it is necessary to also reproduce paragraph 16 mentioned therein. It is contained in the affidavit in support of the summons *in rem.* In that paragraph the following is what Mr. Ping had to state:

> "16. The plaintiff is ready and willing to refer this claim to arbitration in Singapore. No guarantees or undertakings have been given to the Plaintiff in respect of the liquidation or securing of the debt. *In the event that the vessel sails for the High Seas, Plaintiff may lose the opportunity of enforcing its claim against the Defendant vessel in the Republic of Namibia.* I respectfully submit that it is important to Plaintiff that the vessel be arrested as a matter of urgency. *The action against the Defendant vessel is brought to obtain security for the said claim held by Plaintiff."* (The italics are mine)

[12] To my understanding, all that was expressed in the opening sentence of the preceding quotation was an intent and willingness to take the route of arbitration which was in the roadmap of the arbitration clause. The signal sentences regarding the opted venue for seeking relief for the claim in respect of the dispute that arose out of the contract are the ones I have italicised in the reproduction of paragraph 16. In parenthesis I must mention that it is a settled rule of law that the

existence of an arbitration clause in a contract does not operate as an ouster of the High Court's jurisdiction to entertain litigation in relation to the same contract. In this context therefore, the "said claim" in the latter of the italicised sentences was, in my understanding, clearly referable to the claim mentioned in the earlier italicised sentence. There was need for clarification as stated in paragraph 36, *supra,* because the drafter of paragraph 21.10 of the founding affidavit in the motion proceedings appeared to have taken the last sentence of paragraph 16 out of its context when he stated that "(I)t is submitted that it is clear from the last sentence of (paragraph 16) that the action is not an action which falls within the jurisdiction of the above Honourable Court and it is simply an action to obtain security for an arbitration award to be obtained elsewhere."

[13] Moreover, and with due respect to the appellants' counsel, the pertinent principle in *"The Tuyuti*", *supra,* does not support his argument. Granted that that principle does not countenance the practice of concurrently proceeding in arbitration and in court for the same cause, however, in delivering his judgment in that case Goff, L J, reaffirmed the dictum in "*The Andria"*, *supra,* where it was stated, *inter alia*, *"(A)gain, if a party actively pursues proceedings in respect of the claim both in the court and in arbitration, his so proceeding may be regarded as vexatious and an abuse of the process of the court; if so, the court may, in the exercise of its inherent power, require him to elect in which forum he will pursue his claim; see The Cap Bon (1967) 1 Lloyds REP 543."* I, therefore, cannot appreciate counsel's reasoning when he submits that the present *"is not a case where the court needs to put the respondent to an election as to whether it will proceed to arbitration or attempt to proceed in this court. In this case the*

respondent has already elected to proceed to arbitration..." Surely if a party is "actively pursuing the same claim in both the arbitration and in court," it means that that party has at one point in time elected to go for arbitration. In such event, Goff, L J, does not say that that party is to be unsuited, but he says that in the exercise of its inherent power, the court may put that party to an election. Nor is the learned Lordship declaring that in such event the court "is accordingly precluded from arresting the vessel in an action *in rem".* It is evident to me that the party will only be precluded from arresting the vessel if, upon being put to an election, he or she chooses to go to arbitration, a situation which does not obtain in the present case.

[14] What is more, in the instant case the respondent cannot be said to have elected to go for arbitration, let alone initiated arbitration proceedings. The language in which the "Notice of Arbitration" was couched is a far cry from the suggestion that arbitration proceedings were to be instituted. The opening sentence of the last paragraph thereof put it quite clearly, viz "...we are instructed that our client *intends to refer* the dispute to arbitration...". It did not state that the instruction given was that the client *will*, or *has elected to*, go for arbitration, nor did the writer of the letter use words suggestive of initiating such proceedings. Instead there was only an expression of intent. Moreover the learned counsel for the appellants did not place before us any positive pointer, other than the notice of arbitration letter, to support his assertion that arbitration proceedings had been commenced, or that an election to proceed thereto had been made.

[15] In the final analysis, it is with firm confidence that I reject the argument, submitted with great verve, regarding the third issue. I hold that the respondent never *actively pursued* its claim both in arbitration proceedings and in the Court *a quo.* In other words, the argument that the respondent had elected to initiate, or that it had actually initiated, arbitration proceedings, was without substance. It, therefore, follows, in my view, that the respondent never acted vexatiously or abused the process of the Court.

Whether the action *in rem* was intended for obtaining security for Arbitration Proceedings in Singapore.

[16] This issue is intertwined with the third one which I have just resolved. The short answer to the present issue would, therefore, be that since no arbitration proceedings existed either in prospect or *in esse,* it can hardly be expected that the respondent would commence the action *in rem* so as to obtain security for non-existent arbitration proceedings. However, it is necessary to give a more detailed resolution to the poser presented by the subheading hereof because, just as on the other two issues, the appellants' counsel espoused it with vehement arguments.

[17] In the appellants' heads of argument their counsel has submitted that, in paragraph 16 of its affidavit to lead warrant, the respondent had in effect stated "that the action against the vessel is brought *'to obtain security for the said claim held by the plaintiff*". Further, he effectively argued that the respondent had conceded that neither the 1840 nor of 1861 Acts vested jurisdiction in the Admiralty Court to arrest a ship solely to grant security for arbitration proceedings.

According to the learned counsel that concession was made in paragraph 36 of the answering affidavit in the motion proceedings. I have had the opportunity of poring over the respondent's affidavits relating to both the action *in rem* and the motion proceedings and have not found any averment declaring that the respondent had brought the action solely in order "to obtain security for the said claim held by the plaintiff". It is obvious that counsel quoted a portion of paragraph 16, earlier referred to, out of its context. I have dealt with that point in considering the third issue and I find it otiose to reiterate it here. As for the provisions of the 1840 and 1861 Acts, it is unarguable that neither of them vests in the Admiralty Court power *solely* to grant security for arbitration proceedings. Averring that as a statement of fact, as the respondent did through Mr. Ping, is never the equivalent of conceding that one has instituted an action *in rem* in order to obtain security for arbitration proceedings.

[18] If I understood counsel for the appellants correctly, he also contended that the respondent had initially deposed that it had caused the arrest of "The Explorer" so that the vessel could serve as security for arbitration proceedings in Singapore, and that it was only later, after it had been advised that its claim for security for arbitration proceedings in Singapore was not a claim that fell within the Admiral Court's jurisdiction, that it retracted its earlier position in order to assert that the arrest was for obtaining security for the action *in rem*. It is because under the settled rules of procedure a party is not allowed to do that that the appellants' counsel cited *Plascon-Evans Paints v Van Riebeeck Paints*, 1984 (3) 623 at 634E – 635C in aid of his contention on this point**.**

[19] In reaction to his argument I can only reiterate what I have already held, namely that it is not my understanding that the respondent had at any time declared that the arrest was designed to serve as security for arbitration proceedings in Singapore. I accordingly find no merit in the spirited arguments made on behalf of the appellants on this issue and would similarly reject them.

Whether the equipment supplied by the respondent to the First Appellant were necessaries

[20] This was the most hotly debated issue in this appeal. The basic contentions on behalf of the appellants are captured in paragraphs 30, 32, 33 and 34 of their heads of arguments, *viz*:

> "30. The origin of the (admiralty) jurisdiction to entertain claims for necessaries is set out in the judgment of the Right Honourable Dr. Lushington in The Comtesse De Fregeville, a copy of which is attached hereto. Although this judgment has been criticised and overtaken in a number of respects, the portion of the judgment relied on in the case of *Weissglassm NO v Savonnerie Establishment* 1992 (3) 928 (A) at 942B has, it is submitted, not been so overtaken.
>
> 32. It is submitted that the jurisdiction was conferred to enable a vessel in a foreign port or a port which is not its home port to obtain necessary supplies and which were of immediate necessity for the ship (or for its voyage). That an element of this urgency of supply has remained part of the interpretation of the term is demonstrated by the reference in the Weissglass case, *supra.* (Underlining supplied.)
>
> 33. It is submitted that where the contract is for supply of equipment generally necessary for the vessel to enable it to conduct a certain type of operation for which it is suitable amongst a number of operations for which it is potentially suitable, but where such equipment is to be supplied within 6 months of deposit in

> terms of an agreement directly between the owner and the supplier of the equipment, such a claim retains no component of urgency or immediate necessity and accordingly lacks the original rationale behind a necessaries claim.
>
> 34. It is submitted further that to consider the claim *in casu* as a necessaries claim would make nonsense of the distinction drawn in the English Admiralty Court Act, 1861 in sections 4 and 5. It would be difficult to imagine what would be considered as a claim for the equipping of any ship that would under such circumstances not have to be considered as a necessaries claim. If all claims for equipping of a ship were to be considered as necessaries claims, it is submitted, the distinction drawn between the heads of jurisdiction in sections 4 and 5 would not have been made."

[21] In summary, Mr. Van Eeden's tripartite contentions on this issue centre on the following: (1) that the Court *a quo* gave the term "necessaries" an anachronistic interpretation; (2) that the original rationale of necessaries claims was that there should be urgency for the requirement of the goods or services; and (3) that the goods wherewith the current case was concerned were *for equipping* "The Explorer" in terms of section 4 of the 1861 Act, and, therefore not *necessaries* as provided in section 5 of the said Act.

[22] On the basis of the foregoing contentions, it was submitted on the appellants' behalf, that the Court *a quo* had misdirected itself in adopting the dictionary definition of the term "necessaries". Mr. Van Eeden, argued that it was erroneous for that court to have had recourse to a 2006 edition of the dictionary to interpret a "term of art" (as he tagged it) which had its origin in statutes enacted in 1840 and 1861. In his view, the term had to be construed within the spirit prevailing during the period when the statutes were enacted, and, as I understood

him, that spirit was incapsulated in the dictum of The Right Honourable Dr. Lushington in the "*Comtesse De Fregeville*" (1861) Lush 329. Let me straightaway quote that dictum as it appears on pages 331 – 333 of the report:

> "I have to determine whether the demand made in this suit can be maintained within the statute of 3 & 4 Vict. c. 65, s 6, and this question wholly turns upon the proper legal meaning to be affixed to the word 'necessaries'. I have no hope of finding the means of solving this difficulty from resort to any other part of this, or to any other statue; neither has the question ever been submitted directly to the Court of Appeal. In former times and up to a late period, up to the decision in the case of The 'Neptune' (a), by the Judicial Committee, the Court of Admiralty was accustomed to allow material creditors to sue against the proceeds when in Court; material men were those who repaired a vessel, or furnished materials to enable her to proceed to sea, it was a technical term, the meaning of which was well understood. I do not think, as my former decisions shew, that the term 'necessaries' in this statute should receive so a circumscribed a meaning. On the other hand, it had been urged that the term 'necessaries' ought to receive the same liberal construction as in cases of bottomry. This construction would include every requisite for a voyage, for there are many articles allowed to be covered by a bottomry bond, which would be very difficult to comprise within any ordinary meaning attached to the word 'necessaries'. Unless enabled by superior authority, I cannot venture to adopt so comprehensive a meaning for this enactment. It appears to me that the most convenient course I can follow is to take an intermediate one, to make a distinction between the ship and the voyage. I shall hold that 'necessaries' means primarily indispensable repairs, – anchors, cables, sails, when immediately necessary; and also provisions: but, on the other hand, does not include things required for the voyage, as contradistinguished from necessaries for the ship. Were I to hold otherwise, I might be led into allowing expensive outfits, and expenses of many kinds, far removed from any proper meaning of the term 'necessaries' – indeed, some articles for speculative purposes, outfit for passengers, accommodation for troops or special cargoes. The principle upon which I apprehend the statute to have been founded, requires me to draw this line. It was not intended, I conceive, to do more than meet an emergency frequently occurring. Before the statute, foreign ships could not be

> subjected to actions *in rem* under any circumstances for necessaries supplied; it therefore happened that great inconvenience and sometimes danger to ships took place, by the want of anchors or cables, or of provisions. It was to remedy those evils that the statute passed, to remove on the one hand the pressure of immediate want, and on the other to give the British merchant or broker his remedy for such advances. But it would be dangerous to hold that the master could, in all cases, for the commencement of a voyage for instance, bind the property of his owner, even if all was done *bona fide.* There must be a necessity. True it is that by an extended construction of the statute the expense of a bottomry bond might sometimes be saved, but on the other hand it is most dangerous to enlarge the discretionary power of the master to bind the property of his owner. I have looked to see what has been the practice in other countries, especially in the United States, but the practice so differs, and there are so many distinctions, that I cannot derive much assistance from such considerations. I regret exceedingly that I cannot attempt a more clear and decided definition or lay down any general rule beyond what may be understood from the observations I have made. I am unable to do so, and it may be from this difficulty that all the decisions of this Court may not be strictly uniform. I must form the best judgment I can, on each individual case."

[23] As a corollary to the argument that the court below had not appropriately defined the term "necessaries", Mr Van Eeden also contended that the goods supplied to the first appellant, as described above, were intended to equip "The Explorer" in as much as the equipment was designed to enable the said vessel to do under sea mine sampling off the Namibian coast. To that end he submitted that if such equipment were to be construed as necessaries, then it would make nonsense of the distinction drawn between goods for equipping ships and necessaries as respectively provided in sections 4 and 5 of the 1861 Act.

[24] For a better appreciation of the latter contention it is opportune to quote the two sections:

> **"4. AS TO CLAIMS FOR BUILDING, EQUIPPING OR REPAIRING OF SHIPS**
> The High Court of Admiralty shall have jurisdiction over any claim for the building, equipping, or repairing of any ship, if at the time of the institution of the cause the ship or the proceeds thereof are under arrest of the Court.
>
> **5. AS TO CLAIMS FOR NECESSARIES**
> The High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales: Provided always, that if in any such cause the plaintiff do not recover twenty pounds, he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said Court."

[25] While the learned appellants' counsel was advocating for a restrictive meaning of the term "necessaries", Mr. Wragge SC, representing the respondent, argued that the Judge in the Court *a quo* was right in construing the term in a more liberal and wider manner. He urged this Court to uphold the Judge's adoption of the term's ordinary meaning which was consistent with the decision in the local case of *Namibia Ports Authority v "Rybak Leningrada"* 1996 NR (HC) at 359A in which Gibson, J, had followed the decision on the point arrived at in *The "Riga"* (1872) LR 3A & E 516 and *Weissglass NO v Savonnerie Establishment*, *supra.* Before delving into the facts of The "Riga" and before making comments on Weissglass, I have brief remarks to make on the decision in *The "Comtesse de Fregeville"*, *supra,* which Mr. Van Eeden made the main pillar of his reliance on the restrictive construction of "necessaries".

My Assessment of the Submissions and Decided Cases Relied on

[26] Upon reading the *dictum* of The Honourable Dr. Lushington in the last mentioned case in the preceding paragraph, it is quite clear to me that he arrived at the restricted meaning with difficulty. After considering the divergent contentions made by counsel appearing for the parties in that case, Dr. Lushington was constrained to make the following remarks, *"I regret exceedingly that I cannot attempt a more clear and decided definition or lay down any general rule beyond what may be understood from the observations I have made. I am unable to do so, and it may be from this difficulty that all the decisions of this Court may not be strictly uniform. I must form the best judgment I can, in each individual case. (The underlining and italics are mine).*

[27] The foregoing remarks alert me to the fact that Dr Lushington's definition of the term "necessaries" as expounded in *The "Comtesse de Fregeville"* was not intended to be anything more than one applicable in the circumstances of that particular case. He even cautioned that the definition he had come to was not intended to lay down a general rule; and that it was not a "more clear and decided definition." Indeed, as Mr. Van Eeden himself conceded in the course of his submissions, Dr. Lushington's definition was subjected to criticism in a number of later cases. In the ensuing paragraphs I shall show that the more liberal and wider meaning of "necessaries" has been preferred in later cases up to modern times.

[28] The case of *Webster v Seekamp* (1821) 4 Barn & Ald, 352 Vol. 23 Revised Reports, 307, was, admittedly decided before Dr. Lushington's decision in "*The Comtesse de Fregeville"*, but, as I shall show in due course herein, the thread of

its pertinent ratio permeated through a chain of cases subsequent to "*The Comtesse de Fregeville".*

[29] The short facts of *Webster v Seekamp* were that the plaintiffs, brass-founders at Liverpool, instituted an action to recover the amount of their bill for coppering a ship, of which the defendants, who resided at Ipswich, were the owners. In September, 1819, the vessel was at Liverpool, bound on a voyage to Newfoundland and the Mediterranean. The captain of the ship ordered the plaintiffs to copper her; and it was proved that, although it was extremely useful to copper vessels bound to the Mediterranean, it was not absolutely necessary, for many vessels went to the Mediterranean without being coppered. At the trial it was contended that the owner of the ship was liable only for contracts made by the captain in respect of stores or repairs that were *absolutely* necessary; and, therefore, that the defendants in this case were not liable in respect of the coppering. The judge left it to the jury to say whether the coppering was useful and proper for a vessel about to proceed on a voyage to Newfoundland and the Mediterranean, and whether it were such as a prudent owner himself, if present, would have ordered. The jury found that it was. In *rule nisi* proceedings which ensued therefrom, Abbot, Ch. J, made the following dictum in upholding the claim:

> "The general rule is, that the master may bind his owners for the necessary repairs done, or supplies provided for the ship. It was contended at the trial that this liability of the owners was confined to what was absolutely necessary. I think that rule too narrow, for it would be extremely difficult to decide, and often impossible, in many cases, what is *absolutely* necessary. If, however, the jury are to enquire only what is necessary, there is no better rule to ascertain that, than by considering what a prudent man, if present, would do under circumstances in

> which the agent, in his absence, is called upon to act. I am of the opinion, that whatever is fit and proper for the service on which a vessel is engaged, whatever the owner of that vessel, as a prudent man, would have ordered, if present at the time, comes within the meaning of the term "necessary," as applied to those repairs done or things provided for the ship by order of the master, for which the owners are liable. I think, therefore, that the question in this case was properly left to the jury, ..."

[30] As I have already stated, *Webster v Seekamp* was decided before "*The Comtesse de Fregeville",* and, incidentally, it also came before the 1840 and 1861 Acts were enacted. Moreover, it is also important to underscore at this stage that the general rule followed in *Webster v Seekamp* reflected the common law doctrine. It was stated so to be by Sir R. Phillimore in *The "RIGA",* to which case I shall presently advert. The liberal construction of the term "necessaries" was persisted in the post "*The Comtesse de Fregeville"* period.

[31] In *The "RIGA"* 1872 LR 3A & E 516, the subject of claim as necessaries included monies advanced to the captain of the ship for insurance, for freight receivable in London and to pay charges for entering, reporting and piloting the vessel and for tonnage and for light dues, etc. Dealing with a claim for necessaries referable to the monies advanced to the defendants, Sir R. Phillimore, at an earlier stage of delivering his judgment, stated the following, "I am unable to draw any solid distinction (especially since the last statute) between necessaries for the ship and necessaries for the voyage; and I shall follow the doctrine of the common law as laid down by the high authority of Lord Tenterden in the case of *Webster v Seekamp* (4 B & Ald. 352). He then went on and stated:

> "In that case he (that is Lord Tenterden) says (p. 354): 'The general rule is, that the master may bind his owners for necessary repairs done, or supplies provided for the ship. It was contended at the trial that this liability of the owners was confined to what was absolutely necessary. I think that rule too narrow, for it would be extremely difficult to decide, and often impossible in many cases, what is absolutely necessary. If, however, the jury are to inquire only what is necessary, there is no better rule to ascertain that than considering what a prudent man, if present, would do under circumstances in which the agent, in his absence, is called upon to act. I am of the opinion that whatever is fit and proper for the service on which a vessel is engaged, whatever the owner of the vessel, as a prudent man would have ordered, if present at the time, comes within the meaning of the term 'necessary', as applied to those repairs done or things provided for the ship by the order of the master, for which the owners are liable."

The same common law definition was followed by the Judicial Committee of the Privy Council in *Foong Tai & Co. v Buchheister & Co.* 1908 AC 458. In that case the necessaries claim was in respect of repairs done to, stores and equipment provided for, and disbursements made on account of the vessel named *Draco.* The action *in rem* was instituted under section 5 of the 1861 Act. Other cases which followed suit in this regard include: "*The Equator"* 1921 Vol. 9 Ll. LR 1. In that case the necessaries claim was in respect of stevedoring charges rendered to the vessel. In endorsing the claim, the President of the court stated, *inter alia,* "The true view of the matter is that the service of the stevedore was necessary for the adventure upon which the ship was engaged, and the master, as agent of the owners, concurred in procuring the service on credit of the owners, and there is no reason in law why the owners should not be held liable to pay for the service ....." The case of *Borneo Company v "Mogileff" and Freight* 1921 Ll. List LR 528 ("*The Mogileff"*) concerned a claim in respect of alterations, repairs and outfit, wages, stores, provisions, coals, port charges, Suez Canal dues, etc. In "*The Flecha"*

1854 Vol. 17 BMC 438, Dr. Lushington held that a screw propeller fitted to "*The Flecha"* as a replacement and designed to give the vessel added speed was a necessary. The foregoing list of cases in which the common law doctrine was applied is by no means exhaustive.

[32] There is no shadow of doubt that the more liberal and wider construction of the term "necessaries" is the predominant and acceptable one. There is no overt prominence given in that construction to urgency of necessity for the goods and/or services required. The critical part of it is *"If, however, the jury are to inquire only what is necessary, there is no better rule to ascertain that than by considering what a prudent man, if present, would do under circumstances in which the agent, in his absence, is called upon to act. I am of the opinion that whatever is fit and proper for the service on which the vessel is engaged, whatever the owner of the vessel, as a prudent man, would have ordered if present at the time, comes within the meaning of the term 'necessaries'…".* But even if such urgency is implicit, my opinion is that in the present case, the deck machinery, or under sea mine sampling equipment, was urgently required at the time they were ordered to be supplied and fitted to "The Explorer". That was in order to prepare it for the service or adventure on which the vessel was expected to be engaged off the coast of Namibia. The fact that delivery of the equipment was to be made six months after payment of the deposit was, in my view, irrelevant. In my considered opinion, the timing factor is to be reckoned at the point of need for, and not at the usage of, the equipment.

[33] In the case of *Webster v Seekamp,* for example, the coppering was not of immediate necessity at the time of ordering it to be done, which was in Liverpool, while the coppering was going to be useful only when the vessel was to arrive in the Mediterranean. Moreover, the facts of that case show that it was not absolutely necessary to copper the vessel, because many vessels went to the Mediterranean without coppering.

[34] The next aspect which falls to be considered and resolved under this issue is whether the materials supplied *in casu* were equipment, as envisioned by section 4 of the 1861 Act, and not necessaries as contemplated by section 5 of the said Act. On a close perusal of the decided cases which I have cited hereinbefore and in which a variety of goods and services have been held to be necessaries, the impression I have derived therefrom is that there is no watertight compartmentalisation between goods and services dealt with in section 4 as against those in section 5 of the 1861 Act. Furthermore, the liberal and wider construction of the term "necessaries" is implicitly all inclusive. For instance it includes "all necessary repairs done, and supplies provided to the ship". It then goes on and refers to "....whatever is fit and proper for the service on which the vessel is engaged....".

[35] We have noted that section 4 of the Act embraces "building, equipping or repairing" as subjects of claims under that section. In *Webster v Seekamp, supra,* the vessel was coppered in order to enable it to operate viably in the Mediterranean. In my understanding the fact of coppering was in the nature of equipping. In "*The Flecha",* also *supra,* a screw propeller was fitted to the vessel

to enable it to gain extra speed than it was able to do on voyages in the past; that could be looked at as repairing. In "*The Mogileff*" the claim expressly included charges for repairs done to the vessel. In the *Foong Tai & Co. v Buchheister & Co.* case also repairs featured as necessaries. It would appear, therefore, that the inclusion of an item of a hybrid nature in a claim for necessaries is not inevitably fatal to an action *in rem* for necessaries. Furthermore it is an indisputable fact that the deck machinery which was fitted to "The Explorer" was material which was *fit and proper for the service* on which "The Explorer" was engaged, namely to travel to the Namibian coastal area to undertake seabed mineral sampling. I find this last mentioned fact to be a good parallel to the coppering in the *Webster v Seekamp* case, which had to be done in Liverpool in order to enable it to undertake a voyage to the Mediterranean where the coppering was to become useful.

[36] In the result, I feel satisfied and sure that the learned trial Judge cannot be faulted in his holding that the deck machinery supplied by the respondent to the first appellant fell in the category of necessaries. His holding falls in the scope of what Sir R. Phillimore called the common law doctrine as laid down by the high authority of Lord Tenderten in *Webster v Seekamp, supra.*

[37] The overall outcome, after considering the arguments and submissions of counsel on both sides, which arguments and submissions were, I must say, illuminating and indeed learned, is that this appeal fails. Thereupon I make the following order:

1 The appeal is dismissed.

2. The appellants shall jointly and severally bear the costs of the appeal, such costs to include those consequent upon the employment of two instructed counsel.

_____
CHOMBA, AJA

I agree

_____
MAINGA, JA

I agree

_____
MTAMBANENGWE, AJA

COUNSEL ON BEHALF OF THE APPELLANTS:	Mr. P.A. van Eeden
Instructed by:	Fisher, Quarmby & Pfeifer
COUNSEL ON BEHALF OF THE RESPONDENT:	Mr. M. Wragge, SC
Assisted by:	Mr. J.A.N. Strydom
Instructed by:	Engling, Stritter & Part.