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

Case No: A57/2017

In the matter between:

MV 'Chitral' — First Applicant
Chitral Shipping (Pvt) Limited — Second Applicant

and

Coniston Limited — Respondent

Judgment

Lopes J:

[1] This is an application in which the applicants seek a reconsideration and variation of a security arrest order (of the mv 'Chitral') which I granted on the 28th of July 2017, pursuant to the provisions of s 5(3) of the Admiralty Jurisdiction Regulation Act, 1983 ('the Act'). The applicants were directed to provide security for various claims of the respondent, Coniston Limited. Those claims are currently the subject of arbitration proceedings. The applicants were directed to provide, inter alia, security in respect of interest in the sum of US$ 8 139 881.02. That is the part of the order which the applicants wish to have varied.

[2] The history of this matter may be summarised as follows:

JOHANNES BERNING ROBERTSON
COMMISSIONER OF OATHS
PRACTISING ATTORNEY R.S.A.
1ST FLOOR COMPENDIUM HOUSE
5 THE CRESCENT
WESTWAY OFFICE PARK, WESTVILLE, 3629
KWA-ZULU NATAL. TEL: 031 265 0651

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(a) On the 20th of August 2008 three contracts of affreightment ('the contracts') were concluded between Coniston (as despondent owners) and Pakistan Steel Mills Corporation (Pvt) Limited ('Pakistan Steel') in the form of three separate Americanised Welsh Coal Charters. The contracts were for the carriage of coal during the period between the 20th of August 2008 and the 31st of August 2009. The coal was to have been carried from Australia and Canada, and discharged at Port Muhammad in Pakistan.

(b) Various disputes, which arose between the parties, were referred to arbitration in Karachi, Pakistan. The arbitration has not yet been concluded. Coniston avers in its statement of claim that only 528 870 metric tons of coal were carried in terms of ten individual voyage charters. This was against a total of 750 000 metric tons which ought to have been carried. On the 11th of August 2017 Coniston caused the mv 'Hyderabad' to be arrested at Port Elizabeth for security in respect of its claims for unpaid freight, demurrage and damages for detention in the sum of US$ 13 842 864.86, including interest and costs. Of that amount US$ 6 764 280.23 was in respect of interest on Coniston's outstanding claims for freight, demurrage and damages for detention.

(c) In order to secure the release of the mv 'Hyderabad' from arrest, Aspen Insurance UK Ltd provided a Letter of Undertaking in the sum of US$ 4 750 000.00, representing the value of the mv 'Hyderabad'.

(d) As the two arbitrators in Pakistan could not agree on an interim award, an Umpire was appointed by the Pakistan Court. The interim award was claimed for the balance of freight not carried, but which was paid for in advance. The nett sum awarded by the Umpire was US$ 2 542 400.96. Aspen have refused to pay that amount on the basis that it does not accord with the Letter of Undertaking granted by it.

(e) As Coniston viewed its claims to be under-secured, the application was brought before me on the 28th of July 2017 for additional security for the claims for unpaid freight, outstanding demurrage and damages for detention, including interest in the sum of US$ 8 139 881.02 and costs

JOHANNES BERNING ROBERTSON
COMMISSIONER OF OATHS
PRACTISING ATTORNEY R.S.A.
1ST FLOOR COMPENDIUM HOUSE
5 THE CRESCENT
WESTWAY OFFICE PARK, WESTVILLE, 3629
KWA-ZULU NATAL. TEL: 031 265 0651

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in the sum US$ 648 975.00. Pursuant to the arrest of the mv 'Chitral', on the 4th of August 2017, the ship was released by Coniston against the provision of security by Chitral Shipping (Pvt) Limited (the second applicant herein), by way of a further Letter of Undertaking issued by Aspen in the sum of US$ 6 850 000.00, being the estimated market value of the mv 'Chitral'.

(f) Coniston accordingly holds security in the total sum of US$ 11 600 000.00 in respect of its claims, and Coniston regard itself as fully secured with regard to capital (US$ 6 588 584.63) and costs (US$ 648 975.00). The parties are in agreement that Coniston holds security for the interest portion of its claim in the sum of US$ 4 362 440.37.

[3] The applicants maintain that Coniston is not entitled to any security whatsoever for interest on its claims, alternatively, that any such interest for which Coniston is entitled to have secured, is overstated. I am now required to reconsider the order for security for the interest portion of Coniston's claim which I granted.

[4] In this judgment there is no need for me to deal in any way with the basis upon which the mv 'Chitral' was considered to be an 'associated ship' of the ships which executed the voyages pursuant to the three contracts. It is common cause that in order for Coniston to claim a right to security for its interest claims, it must discharge the onus of proving, *prima facie,* that it has a claim for interest against Pakistan Steel in the amount claimed, which claim is *prima facie* enforceable in the Pakistan arbitration proceedings, and that on a balance of probabilities it has a genuine and reasonable need for security for its claim. With regard to the satisfaction of a *prima facie* case, Coniston need do no more than provide evidence which, if accepted, will establish a cause of action. That evidence must consist of allegations of fact.

See: *Cargo Laden and Lately Laden on board the MV Thalassini Avgi v MV Dimitris* 1989 (3) SA 820 (A) at 831F-834I.

JOHANNES BERNING ROBERTSON
COMMISSIONER OF OATHS
PRACTISING ATTORNEY R.S.A.
1ST FLOOR COMPENDIUM HOUSE
5 THE CRESCENT
WESTWAY OFFICE PARK, WESTVILLE, 3629
KWA-ZULU NATAL. TEL: 031 265 0651

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[5] The only issues argued before me were the right to security for interest, the type of interest, the applicable dates from when, and until when, interest should be awarded, and the applicable rate.

[6] Mr *Mullins SC*, who appeared for Coniston, pointed out that the practice in security arrest applications has been to rely upon hearsay evidence provided by foreign practitioners with regard to the approach of arbitrators and matters of practice in foreign jurisdictions, including estimates of costs and interest rates applicable, and likely to be awarded by arbitrators in various currencies. He conceded that Mr Reddy, the deponent to Coniston's founding affidavit in the application to arrest the mv 'Chitral', relied upon advice given to him by solicitors, and Mr Edward Tuner of Michael Else & Company, the managers of the charterers P&I club with which Coniston is entered.

[7] Mr Reddy recorded in his founding affidavit that:

(a) Coniston's Hong Kong solicitors, Holman Fenwick & Willan, advised, on the basis of advice received from Usmani & Iqbal, solicitors of Karachi, that Coniston was entitled to claim simple interest at the rate of 14 percent per annum from the date of commencement of the arbitration proceedings until payment, on the unpaid freight element of its claim, demurrage and damages for detention. (He made the same allegations in his founding affidavit for the arrest of the mv 'Hyderabad').

(b) The arbitration proceedings were commenced in October 2009, and Coniston seeks security for interest on its claims from the 1st of October 2009 until the 5th of August 2016, plus further interest until the award in respect of freight could be secured.

JOHANNES BERNING ROBERTSON
COMMISSIONER OF OATHS
PRACTISING ATTORNEY R.S.A.
1ST FLOOR COMPENDIUM HOUSE
5 THE CRESCENT
WESTWAY OFFICE PARK, WESTVILLE, 3629
KWA-ZULU NATAL. TEL: 031 265 0651

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(c) On the instructions of the Umpire, the arbitrators still have to decide whether Coniston should be awarded a 'mark-up' (similar to interest but which only operates once) on the unpaid freight.

(d) It would take approximately another twelve months' before an award for interest, demurrage and damages for detention could be secured from the arbitrators. (The parties are agreed that that has still not happened).

(e) Interest will continue to accrue on the capital amount of unpaid freight already awarded by the Umpire.

(f) Based upon the aforegoing Coniston claims interest in the sum of US$ 7 217 478.57. Continuing that interest up to the 28th of July 2018 equates to a further sum of US$ 922 402.45, until the amounts due are paid.

[8] Coniston avers that those allegations were sufficient to ground the application for security pursuant to which I granted the order of the 28th of July 2017. They were also, apparently, accepted as sufficient by the Eastern Cape Local Division when the order for the arrest of the mv 'Hyderabad' was granted on the 11th of August 2016.

[9] Although the advice given to Mr Reddy was not contained in a written advice or expert opinion which was included in the papers, I accept, on the basis that the application was urgent, and that hearsay evidence is routinely accepted in such applications, that sufficient evidence was adduced to establish a *prima facie* case.

[10] When this application was brought, both parties provided written opinions of their experts, who dealt with the applicability of interest, as well as the rates likely to be awarded. As the original order was granted *ex parte*, the onus remains upon Coniston to establish its entitlement to the interest order. It may, however, rely upon new material in resisting the application to reduce the security for interest.

JOHANNES BERNING ROBERTSON
COMMISSIONER OF OATHS
PRACTISING ATTORNEY R.S.A.
1ST FLOOR COMPENDIUM HOUSE
5 THE CRESCENT
WESTWAY OFFICE PARK, WESTVILLE, 3629
KWA-ZULU NATAL. TEL: 031 265 0651

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See: *MV Pasquale Della Gatta, MV Filippo Lembo: Imperial Marine Co v Deiulemar Compagnia Di Navigazione Spa* 2012 (1) SA 58 (SCA) para 58.

[11] Coniston relies upon two legal opinions:

(a) One by Ms Angharad Parry, a barrister of the bars of England and Wales, who practices extensively in the field of international commercial dispute resolution. It is apparent that she is qualified to speak to the issues on which she opines. After outlining the facts, she concludes that:

(i) The substantive law of the dispute is English Law.

(ii) The curial law (the law governing the arbitration proceedings) is that of Pakistan.

(iii) Coniston's entitlement to interest *per se* is to be determined by English Law.

(iv) In terms of the English Conflicts of Law rules, matters of procedure are governed by the curial law. Accordingly, any interest rate awarded would be determined by the law of Pakistan. This would include the rate of interest, whether it is to be simple interest or compounded, and if so at what rests (daily, quarterly or annually), or uplifts.

(v) Under English Law, a debt due and owing to Coniston, such as the unpaid freight, would attract interest. This would also apply to damages for breach of contract.

(vi) Although there are academic disputes about whether interest rates are procedural, and whether curial or substantive law applies, the English courts apply the provisions of the Arbitration Act 1996.

(vii) Coniston would be entitled to pre-award interest pursuant to English Law. Whether that interest should be simple or

JOHANNES BERNINGROBERTSON
COMMISSIONER OF OATHS
PRACTISING ATTORNEY R.S.A.
1ST FLOOR COMPENDIUM HOUSE
5 THE CRESCENT
WESTWAY OFFICE PARK, WESTVILLE, 3629
KWA-ZULU NATAL. TEL: 031 265 0651

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compound interest, and the rates and rests, are to be determined according to the law of Pakistan.

(viii) On a best arguable case, if the arbitration was heard in England, a rate of as high as 8 percent, compounded at three monthly rests, could be reasonably arguable. Rates could be different if evidence of borrowing costs was adduced.

(b) The other, by Sajid Zahid a barrister-at-law of Pakistan, and a senior partner in Orr, Dignam & Co of Karachi, Pakistan. His views on whether Coniston may claim interest in the arbitration proceedings, and if so, at what rate, may be summarised as follows:

(i) The award of interest in arbitrations in Pakistan is governed by the Arbitration Act 1940 of Pakistan.

(ii) A Court awarding a payment of money, may order such interest as it deems reasonable, on the principal sum from the date of the Court's decree (where a judgment is granted pursuant to an arbitration award). Pre-judgment interest may be awarded if allowed by a statutory provision, an agreement between the parties, a mercantile usage or upon equitable considerations.

(iii) The law of Pakistan will recognise an agreement governed by applicable foreign law. Pakistan law does not prohibit interest *per se*.

(iv) On the facts of this matter, simple interest calculated at 14 percent is not exaggerated, and may be viewed as reasonable. The right to charge interest would be governed by the substantive law (English Law).

[12] Mr *Mullins* submitted that these opinions are not in conflict with each other inasmuch as Ms Parry states that the rate of interest would be determined by the law of Pakistan, whereas Mr Zahid states that it would be determined by the substantive law – English law. As the two systems agree with the award of interest *per se*, only

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the amounts which could be awarded in relation to the security required, was relevant. Ultimately it has to be determined whether Coniston is over-secured in respect of interest. On the opinion of either expert it is not.

[13] Ms *Mills,* who appeared for the applicants, submitted that the correct test was that Coniston has to prove *prima facie*, its entitlement to interest on its claims as well as the quantum thereof. Coniston's reliance on a 'reasonably arguable best case' is misplaced. Ms *Mills* submitted that Coniston had not alleged facts, which if proved, would entitle it to an interest award on each of its claims from a particular date, and at a particular rate. Ms Parry had only opined on the applicability of interest on the unpaid freight claim, and not on the other debts. Ms *Mills* submitted that Ms Parry was only dealing with liquidated claims, which the claims for outstanding demurrage and damages for detention were not. She further submitted that Coniston could not ask for one part of Ms Parry's opinion to be accepted and not the whole opinion.

[14] Ms *Mills* submitted that no case was made out by Coniston for its right to interest at a *prima facie* level, both as to the fact of an entitlement to interest, as well as the type of interest applicable, and the appropriate rates of interest. The fact that the Umpire has not awarded interest, but a mark-up, contradicts the case for Coniston, and its papers do not deal with this.

[15] Ms *Mills* also pointed out that s 5(3) of the Act requires that the claim for interest must be enforceable in Pakistan. The common cause approach of the parties is that the arbitrator has a wide discretion with regard to interest. The experts for Coniston have not dealt with the facts which may be considered by the arbitrator in the exercise of his discretion – eg is the cost of borrowing applicable, are the awards meant to be punitive, etc. The facts of the various cases alluded to by the experts were not recorded in their opinions – only the results. No historical basis is laid by them for the award of interest rates. Ms *Mills* submits that all this flies in the face of the requirements laid down in *Pasquale Della Gatta*.

[16] Ms *Mills* submits that upon a proper examination of all the evidence (and the fact that Coniston bears the onus), no facts have been provided upon which a Court could award security.

[17] In reply Mr *Mullins* submitted that any contradiction between Ms Parry and Mr Zahid is of no moment because the evidence clearly demonstrates that whichever legal system is used to determine the factors involved in calculating interest, Coniston remains under-secured for interest.

[18] In my view:

(a) The opinions of the experts for Coniston establish that interest may be claimed in either English law or the law of Pakistan.

(b) The applicants accept that, contrary to the initial suggestion in the expert opinion of Mr Tayebaly of Moshin Tayebaly & Co, the award of interest in Pakistan is not prohibited. He accepts that the cases referred to by him were later reversed and referred back to the Federal Shariat Court for decision afresh, on the question of whether the interest awarded has the taint of 'Riba' in accordance with the injunctions of Islam. No information is then provided as to the referral.

(c) The initial affidavit of Mr Reddy provided sufficient information to establish at a *prima facie* level that interest may be recovered in the arbitration proceedings, the type of interest, from when it is applicable and at what probable rate. Contrary to the submissions of the applicants, the expert opinions of Ms Parry and Mr Zahid deal with the right of Coniston to claim and be paid interest on all the claims including those which are submitted to be illiquid claims. No evidence was led, nor cases cited to contradict the opinion of Ms Parry in this regard.

(d) With regard to the Umpire's award, the learned former Supreme Court judge decided that Coniston was entitled to be paid the net outstanding freight, being the balance of the freight payable less the dispatch admitted by Coniston – the total payable to Coniston being US$ 2 542 440.96, payable within 45 days of the award. The arbitrators were given leave by the Umpire to determine whether Coniston is entitled to be paid a mark-up on the amount of unpaid freight. It is the un-contradicted view of Mr Zahid that courts in Pakistan interchangeably refer to interest and mark-up. The Umpire has not made any award of interest. This issue is still to be decided by the arbitrators, and the reference by the Umpire to mark-up does not, apparently, exclude the concept of interest according to Mr Zahid.

(e) The expert opinions establish that the advice initially given to Mr Reddy was substantially correct. Even if the two experts for Coniston have differing views as to the law which will determine the type and rate of interest, Coniston has demonstrated that, even with the award of security contained in my order of the 28th of July 2017, it remains under-secured for interest.

(f) Accordingly, the application to reduce the level of security awarded to Coniston interest must fail.

[19] Ms *Mills* submitted that the applicants should be awarded costs up to the stage of Coniston's answering affidavit. This is because a proper case was not made out in the initial application, and even if Coniston is now successful, the applicants were entitled to bring their application. Coniston have, in a sense relied upon their arguably worst case, because whatever the interest calculations used, at the lowest level they remain under-secured. I see no reason that costs should not, as usual, follow the result.

[20] I accordingly make the following order:

JOHANNES BERNING ROBERTSON
COMMISSIONER OF OATHS
PRACTISING ATTORNEY R.S.A.
1ST FLOOR COMPENDIUM HOUSE
5 THE CRESCENT
WESTWAY OFFICE PARK, WESTVILLE, 3629
KWA-ZULU NATAL. TEL: 031 265 0651

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The application is dismissed with costs, such costs to include the employment of senior counsel.

Lopes J

Date of hearing	7th of December 2018.
Date of judgment:	19th of December 2018.
For the applicants:	Ms *L Mills* (instructed by Bowman Gilfillan Inc).
For the respondent:	Mr *S R Mullins* SC (instructed by Shepstone & Wylie).

JOHANNES BERNING ROBERTSON
COMMISSIONER OF OATHS
PRACTISING ATTORNEY R.S.A.
1ST FLOOR COMPENDIUM HOUSE
5 THE CRESCENT
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