IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, GRAHAMSTOWN

CASE NO: ECD 1971/11
Date Delivered: 18 July 2013

In the matter between

THE MV 'SNOW PETREL"	FIRST APPLICANT
BLUE WATERS MARINE LLC	SECOND APPLICANT

and

EX-EX TRAVEL CC t/a EXTRAORDINARY EXPEDITIONS	RESPONDENT

JUDGMENT

GOOSEN, J.

[1] This is an application for security made in terms of s 5(2) of the Admiralty Jurisdiction Regulation Act, 105 of 1983 (the Admiralty Act) and for security for costs made in terms of Rule 47 of the Uniform Rules of Court. The respondent is the plaintiff in an admiralty action *in rem* instituted against the applicants. The second applicant was, until recently, the owner of the first applicant. In instituting the said action the respondent caused the first applicant vessel to be arrested. Following negotiations between the parties the first applicant was released from arrest upon security for the respondent's claims being furnished by way of a bank guarantee issued by Nedbank Limited, in an amount of R2 253 948.92. The second applicant instituted a counterclaim against the respondent for damages arising from an alleged repudiation of a charterparty agreement concluded between it and respondent. In this application the applicants seek counter-security for the counterclaim as well as

security for costs in relation to the defence of the main claim. The applicants also seek a reduction of the security furnished in respect of the respondent's main claim.

[2] The respondent's claim against the applicants arises from a written charterparty agreement concluded between respondent and the second applicant on or about 11 April 2011. In terms of the agreement the second applicant undertook to deliver to the respondent the first applicant vessel at the port of delivery, being Cape Town, on 1 June 2011, subject to certain conditions and against payment of an agreed charter fee. The charter was for a period of two months terminating on 3 August 2011.

[3] It was agreed that the vessel would be supplied and fitted with certain equipment including two RIB's with 50hp outboard engines; storage for 1000l of petrol; two dive compressors; 20 steel scuba cylinders; a covered dive briefing area and an amidships boarding gangway with flotation dock. It was agreed that the vessel would be available for final inspection by the charterer on 20 May 2011.

[4] The respondent's claim is founded on the allegation that the second applicant failed to deliver the vessel in the proper condition as agreed between the parties and on the date as agreed between the parties. Based upon the alleged breach of the agreement the respondent claims payment of the amount paid by it to the second applicant by way of the charter fee (an amount of R550 000.00) (claim 1); payment of an amount of R275 000.00 as liquidated damages provided for by the terms of the agreement (claim 2); and payment of a dollar denominated amount of $77 000.00 and an amount of R101 000.00 for damages (claims 3 and 4).

[5] The second applicant's counterclaim is based on the allegation that the respondent's purported cancellation of the agreement on 12 July 2011 constituted an unjustified repudiation of the agreement which the second applicant elected to reject. The second applicant accordingly claims payment of the balance of the charter fee then due being the sum of R350 000.00. In addition the second applicant claims damages pursuant to the respondent's failure to redeliver the vessel at the termination of the charter on 3 August as a result of the respondent having caused the vessel to be arrested prior to the termination of the charter. The second applicant accordingly claims loss of profits which it would have earned from use of the vessel between the date of the end of the charter and the date of the release of the vessel from arrest, being an amount of R2 160 000.00. The second applicant further claims damages pursuant to the wrongful arrest of the vessel calculated on the basis of the costs of crew and agent's fees in a total amount of R101 500.00.

[6] I shall deal hereunder with each of the security applications in turn.

The counter-security application

[7] As indicated the second applicant has instituted a counter claim against the respondent. It is in respect of this counter claim that the second applicant seeks security.

[8] Section 5(2) of the Admiralty Act , *inter alia*, provides that:

> A court may in the exercise of its admiralty jurisdiction –
> (b) order any person to give security for costs or for any claim;
> (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 otherwise.

[9] It is well established that the court's power extends to the granting of counter-security in an admiralty action. It must however be established that the applicant for such counter security has a *prima facie* case in respect of its counterclaim and that it has a genuine and reasonable need for security. In exercising its discretion to order such security the court is guided by the general principles applicable to ordering security for a claim.

[10] The second applicant's counterclaim is conditional upon the trial court finding that the second applicant had delivered the vessel in accordance with the agreement as amended or that the respondent had elected or was estopped from denying that it had elected to uphold the agreement.

[11] The second applicant claims, in the first instance, payment of the balance of the charter fee, being R350 000, and, further, payment of damages pursuant to the respondent's breach of the agreement. The first of these damages claims consist of a loss of profit claim pursuant to the respondent's failure to redeliver the vessel to the second applicant at the end of the charter period. This claim is quantified in the amount of R2 160 000.00, although the founding affidavit refers to an amended claim in the amount of R7 560 000.00. The quantification of the claim is based on estimated losses of R900 000.00 per month from 3 August 2011 until 17 October 2011 and the amended quantum is based on the extension of the period until 17 April 2012 when the vessel was sold.

[12] The second damages claim is based on the allegation that the arrest of the vessel at the instance of the respondent was without cause and comprises losses suffered in respect of costs of crew and agent's fees whilst the vessel was under arrest in the amount of R101 500.00. The founding affidavit similarly indicates an intention to amend the claim by increasing it to R311 500.00 taking into account the period until the vessel was sold.

[13] It is contended on behalf of the second applicant that, on the papers before me, the second applicant has established a *prima facie* case. In this regard it is submitted that the claim for payment of the balance of the charter would flow as a natural consequence of a finding that the respondent was not entitled to cancel the contract as it purported to do on 12 July 2011. Since it is common cause that the second applicant "made available" the vessel to the respondent on 8 June 2011 and that the respondent caused the vessel to sail from Cape Town to East London on that date, so it was submitted, the conditions founding the second applicant's claims in reconvention are *prima facie* established.

[14] The requirement to establish a *prima facie* case is satisfied if it is shown that there is evidence which, if accepted, will establish a cause of action. In *Hulse-Rutter and Others v Godde* 2001 (4) SA 1336 (SCA) Scott JA described the test to be applied in the context of an attachment to found jurisdiction as follows at par.12:

> [12] The requirement of a *prima facie* case in relation to attachments to found or confirm jurisdictions has over the years been said to be satisfied if an applicant shows that there is evidence which, if accepted, will establish a cause of action and that the mere fact that such evidence is contradicted will not disentitle the applicant to relief - not even if the probabilities are against him; it is only where it is quite clear that the applicant has no action, or cannot succeed, that an attachment should be refused. This formulation of the test by Steyn J in *Bradbury Gretorex Co (Colonial) Ltd v Standard Trading Co (Pty) Ltd*1953 (3) SA 529 (W)

> at 533C - D has been applied both by this Court and the Provincial Divisions. (See, for example, *Cargo Laden and Lately Laden on Board the MV* Thalassini Avgi *v MV* Dimitris 1989 (3) SA 820 (A) at 831F - 832B; *Weissglass NO v Savonnerie Establishment*1992 (3) SA 928 (A) at 936E - H.) One of the considerations justifying what has been described as generally speaking a low-level test (*MT* Tigr: *Owners of the MT* Tigr *and Another v Transnet Ltd t/a Portnet (Bouygues Offshore SA and Another Intervening)*1998 (3) SA 861 (SCA) at 868I) is that the primary object of an attachment is to establish jurisdiction; once that is done the cause of action will in due course have to be established in accordance with the ordinary standard of proof in subsequent proceedings. (See the *Bradbury Gretorex* case *supra* at 531H - 532A.) No doubt for this reason Nestadt JA, in the *Weissglass* case *supra* at 938H, warned that a court 'must be careful not to enter into the merits of the case or at this stage to attempt to adjudicate on credibility, probabilities or the prospects of success'

[15] This test is one which is applied also in relation to so-called “security arrests” in terms of section 5(3) of the Admiralty Act (see *Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris* 1989 (3) SA 820 (A) at 868B- H; *MT Tigr Owners of the MT Tigr and Another v Transnet Ltd t/s Portnet (Bouygues Offshore SA and Another Intervening)* 1998 (3) SA 861 (SCA)).

[16] In *MV Pasqualle Della Gatta MV Filippo Lembo Imperial Marine Co v Deuillemar Compagnia Di Navigazione Spa* 2012 (1) SA 58 (SCA) Wallis JA dealt with the question as to whether, in determining whether a *prima facie* case is established regard ought to be had to relevant factual material as it appears in opposing affidavits which undermine the claimant’s case as follows:

> [23] The consideration of such evidence does not offend against any basic principle underpinning the traditional approach to proof of a prima facie case. Whilst the fact that the merits will be considered at a later stage is said to provide the justification for adopting this low-level test in cases of attachments to found jurisdiction, it is not relevant to the consideration of an application for a security arrest in terms of s 5(3) of the Act. A security arrest is not directed at establishing the court's jurisdiction in future proceedings but at obtaining final relief in the form of an order that security be provided for the outcome of proceedings in another forum, usually in another jurisdiction.[5] This is a special jurisdiction vested in our courts under the Act[6] and in determining whether to order an arrest it is inappropriate for the court to shut its eyes to admissible and relevant evidence that is not and cannot be disputed. This is particularly so because obtaining security may play a crucial role in decisions concerning the future conduct of the foreign proceedings and can even lead to their being abandoned or settled.
> [24] Leaving that aside, two other points fall to be made about the approach to proof of a prima facie case. They are first that where the applicant asks the court to draw factual inferences from the evidence they must be inferences that can reasonably be drawn from it, even if they need not be the only possible inferences from that evidence. If they are tenuous or

> far-fetched the onus is not discharged. Second, the drawing of inferences from the facts must be based on proven facts and not matters of speculation. As Lord Wright said in his speech in *Caswell v Powell Duffryn Associated Collieries Ltd*:
> 'Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish . . . But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.'[7]

[17] The second applicant's claims in reconvention are premised upon the allegation that a) the charterparty agreement was varied insofar as the delivery of the vessel was concerned by reason of a change to certain specifications required by the charter (notably the construction of an embarkation and disembarkation gangplank); b) the vessel was inspected by the charterer on 20 May 2011 and c) that delivery of the vessel occurred on 8 June 2011. Based on these allegations it is contended that it is to be inferred that the respondent accepted delivery in accordance with the amended agreement and elected not to repudiate the agreement on the basis of late delivery or failure to comply with the conditions stipulated in the agreement. It is further alleged that the second applicant complied with its obligations provided for in the agreement.

[18] The opposing affidavit pertinently deals with this allegation. Whilst it is admitted that the vessel was delivered to the respondent it is denied that delivery was in accordance with the terms of the agreement. To the contrary it is alleged that the delivery was defective. It is pointed out that the second applicant has failed to plead an amended agreement such as would accommodate the several deficiencies pleaded by the respondent in particulars for trial furnished to the applicants and that the second applicant failed to address these deficiencies in its claim for security.

[19] Whilst it is so that the test for establishing a *prima facie* case is a low level test, it is nevertheless one that the party claiming security must satisfy. In this instance it cannot be ignored that a central element of the second applicant's case against the

respondent in reconvention is in dispute and that the second applicant does not address the issues as pleaded. It is accordingly not apparent what evidence is available which, if accepted at trial, would *prima facie* establish that delivery of the vessel occurred in accordance with the terms of the agreement save the assertion that such delivery occurred.

[20] In *MV Heavy Metal Belfry Marine Ltd v Palm Base Maritime SDN BHD* 2000 (1) SA 286 (C) Comrie J set out the approach to the question of counter security in a matter such as this in the following terms :

> 'In the first place, it is evident that s 5(2)*(a) – (c)* of the statute vests the Court with a wide power, in its discretion, to order that security or counter-security be furnished for claims and counterclaims. Secondly, confining myself to counterclaims, clearly the Court must have jurisdiction, which is invariably present in the circumstances. Thirdly, it seems to me that an applicant must show at least a prima facie case in respect of its counterclaim(s). I say at least because less would not warrant security, while in my view more may be required in an appropriate case. Fourthly, I think an applicant must show a genuine and reasonable need for security. . . . Finally, the Court has a discretion which in my opinion should not be unduly circumscribed. All sorts of factors can arise in different cases which may affect the exercise of the discretion, such as whether the arrest was in terms of s 5(3); the location of the forum; whether the arresting party is a *peregrinus* of this Court; the nature of the counterclaims; and the effect that a forfeiture order may have on the arrestor's position . . . The list is not exhaustive. The Court may find itself weighing and balancing competing interests. The strength of the counterclaimant's case on the merits may then become a factor to be weighed in the balance. It follows from all this that I do not necessarily find myself in the sparing school of thought, but that I do recognise a substantial need for caution.'
> (Emphasis added)

[21] This approach was expressly approved by the court in *Pasqualle Della Gatta* at par 57. Of significance is the fact that the approach contemplates that a party seeking such security may, in appropriate cases, be required to show more than it has at least a *prima facie* case.

[22] In my view this is such a case. The allegation that delivery of the vessel occurred in accordance with the terms of the agreement is crucial to the foundation of the second applicant’s defence to the claim in convention and its claims in

reconvention. It is the basis upon which it contends that the respondent's purported cancellation of the agreement on 12 July constituted an unlawful repudiation and that its action in causing the arrest of the vessel was without cause entitling the second applicant to claim damages pursuant to the breach of the agreement to redeliver the vessel at the end of the charter period.

[23] In the case of the loss of profit claim no particularity is alleged in respect of the alleged loss of profit nor, in the application for security, is a case made out as to the basis upon which the claim is quantified nor is any evidence adduced to support the loss of profits for the period during which the vessel was under arrest. That the application lacks any substantive basis for the quantification of the loss of profits is conceded by the second applicant's counsel who sought to deal with the deficiency by way of applying a substantial contingency allowance for purposes of determining the quantum of security to be ordered. In my view this does not avail the second applicant. The second applicant must show that it has a *prima facie* claim, which requires that it show that there is evidence which if accepted establishes its cause of action. This it has not done.

[24] Furthermore, where this aspect is in dispute on the pleadings based upon extensive factual allegations relating to the condition of the vessel as at the date of inspection and on the date of delivery, more is to be expected than the mere assertion that the vessel was delivered in accordance with the terms of the agreement and that by virtue of the alleged acceptance of delivery it is to be inferred that the respondent elected not to cancel or is estopped from doing so.

[25] The same applies in respect of the second damages claim. In respect of both the loss of profit and the damages pursuant to the arrest of the vessel the second applicant must establish that the arrest of the vessel was without reasonable and probable cause and accordingly wrongful (see s 5(4) of the Admiralty Act).

[26] In *MV Heavy Metal* (supra at 294 - 295) the court found that the phrase "reasonable and probable cause" means an honest belief founded on reasonable grounds. No allegation to this effect is to be found in the papers nor does the second applicant allege facts which would tend to establish that the plaintiff did not have an honest belief that the arrest of the vessel was a necessary step in the prosecution of its claim against the applicants.

[27] It is common cause that the respondent, by way of a letter addressed on its behalf by its attorneys, exercised a right to cancel the charter party agreement on 12 July 2011 and that thereafter instituted an admiralty action *in rem* by the arrest of the vessel. It is not in dispute that the arrest was a necessary step in respect of the institution of the proceedings. What is in dispute is the respondent's entitlement to so institute proceedings, based on the allegation that the respondent was not entitled to cancel the agreement. Even accepting that this is so, that allegation does not establish that the respondent did not honestly and reasonably believe that it was entitled to pursue the litigation. The application for security also does not address the evidence necessary to establish a claim for damages based on the alleged wrongful arrest of the vessel. In the circumstances I am unable to conclude that the second applicant has discharged the onus of establishing that it has a *prima facie* case against the respondent in reconvention.

[28] In the light of the conclusion I have reached on this aspect of the matter it is unnecessary to consider the further aspect, namely whether the second applicant has established a genuine and reasonable need for security. I am prepared to accept that the plaintiff's financial position, although not as precarious as the second applicant would have it, is such that a need for security, having regard to the extent of the claims made by the second applicant, can be established.

[29] As pointed out in *MV Pasqualle Della Gatta* at par 57, however, proof of the requirements for counter-security is not decisive. The court is called upon to exercise a discretion whether to order that security be given. That discretion, as noted in the *MV Heavy Metal* case is not unduly circumscribed and that "(a)ll sorts of factors can arise in different cases which may affect the exercise of the discretion, such as whether the arrest was in terms of s 5(3); the location of the forum; whether the arresting party is a *peregrinus* of this Court; the nature of the counterclaims; and the effect that a forfeiture order may have on the arrestor's position . . ."

[30] In this instance I am mindful that the application for counter-security arises in consequence of the fact that the respondent holds security for its claims by reason of the arrest of the vessel as a necessary consequence of the commencement of an admiralty action *in rem* and the subsequent release of the vessel at the instance of the applicant's upon the giving of security. I also take into consideration that the respondent is an *incola* of this court. Although there is no bar to a court granting security in terms of s5(2) of the Admiralty Act to a peregrine claimant, it is a power which is to be exercised sparingly (see *Sunnyface Marine Ltd v Hitoroy Ltd (Transorient Steel Ltd and Another Intervening; Sunnyface Marine Ltd v Great River*

Shipping Inc 1992 (2) SA 653 (C) at 657; *The MV Leretsi Afris Shipping International Corporation v MV Leretsi (DMD Maritime Intervening)* 1997 (2) SA 681 (D) at 689, where the court said that "(u)nless it is to assist a litigant with a firm claim to bring against a defendant who may not otherwise satisfy a judgment, I do not think it should be readily granted.").

[31] In the circumstances I am not satisfied that the second applicant has made out a case which warrants the exercise of discretion in its favour. It follows that the application for counter-security should be dismissed.

Application for reduction of security given

[32] The applicants' claim for reduction of security provided by way of the Nedbank guarantee furnished to secure the release of the vessel from arrest is based on a narrow foundation, namely that the respondent's claims for damages (claims 3 and 4 referred to above) are precluded by the terms of the Conventional Penalties Act, 1962.

[33] The second applicant's case is based on the allegation that plaintiff's claim 2 (in the amount of R275 000.00) is a claim for liquidated damages for which the contract makes provision and that it is in the nature of a penalty claim as envisaged by sections 1 and 2(1) of the Conventional Penalties Act. Based on this, it is argued, the security given ought to be reduced by the amounts taken into account in respect of claims 3 and 4.

[34] The respondent's answer to this is that the security provided is in a fixed rand value and that the delay occasioned by the institution in these proceedings necessarily has an adverse effect on the value of the security in respect of that portion of its claim that is Dollar denominated because of fluctuating exchange rates. It is also argued that the effect of discharging security would be to dismiss the respondent's claim without evidence being led. It is submitted that even if it is accepted that portions of the respondent's claim are unsustainable by virtue of the provisions of the Conventional Penalties Act it would be impossible to determine the amount that should now be discharged because the applicants, in giving security, did not particularise the amounts given. In any event the respondent relies upon an oral variation of the terms of the written agreement and founds its claims for damages upon a tacit term of the agreement and that the damages sought to be recovered were at all times within the contemplation of the parties. The respondent also submits that even if it is to be assumed that clause 9 of the agreement constitutes a penalty stipulation, the respondent is entitled to treat the claim for R275 000.00 as a claim in the alternative to the particularized damages set out in its claims 3 and 4.

[35] Section 2(1) of the Conventional Penalties Act provides that:

> A creditor shall not be entitled to recover in respect of an act or omission which is the subject of a penalty stipulation, both the penalty and damages, or, except where the relevant contract expressly so provides, to recover damages in lieu of the penalty.

[36] In *De Lange v Deeb* 1970 (1) SA 561 (O) it was held that the term "expressly" means no more than that the choice to recover damages be expressly provided for. In coming to this conclusion the court in that matter cited a passage

from *Commissioner of Inland Revenue v Dunn*, 1928 E.D.L 184 at p. 195 where Gane A.J. said:

> 'The words are stringent and there are many cases illustrating the strong force of the words 'express' and 'expressly'. On the other hand there are cases in which it has been held that 'express' does not mean 'by special reference' or 'in identical words' but only 'with reasonable clearness' or 'as a necessary consequence'.'

[37] The court in *De Lange* went on to state (at 563D -E) that:

> The right to recover damages is an alternative right according to the Act and I do not agree with the submission that clause 8 provides for the recovery of the penalty and, in addition, damages. If however, that is what it means then it would seem that, if the creditor is given the right by contract to claim damages in addition to the penalty, that would include the lesser right of claiming damages in lieu of the penalty. If then the right to recover damages in addition to the penalty is not enforceable by reason of the provisions of the Act, the creditor must still have the right to claim it in lieu of the penalty.

[38] The respondent does not concede that clause 9 of the written agreement constitutes a penalty stipulation. That is an issue which no doubt will be required to be decided by the trial court. The Respondent also seeks to rely upon a further oral term of the agreement as founding the basis for its claims. That issue too is one to be decided by the trial court. It is, in my view, not appropriate to attempt to resolve such issues in the context of an interlocutory application relating to the question of security for claims.

[39] This court is vested with a discretion whether or not to order a reduction in the security provided. In doing so it must have regard, *inter alia*, to the fact that a party is generally entitled to security in an amount determined on the basis of its reasonably arguable best case (see *MV Pasqualle Della Gatta* (supra) at par.58), the amount being established on a balance of probabilities. In these circumstances, in the light of the disputed basis upon which the respondent advances its claims, it is not possible to determine where the balance of probabilities lies. Given the fact that security has

already been furnished that must mean that the applicants cannot succeed in securing the reduction of security for which they contend.

[40] It must also be borne in mind that the applicants do not contend for any prejudice in respect of the continued provision of the security. When regard is had to all of these circumstances and the effect that a reduction in security may have upon the respondent's claims I am unable to exercise my discretion in favour of the applicnats. It follows that the application for a reduction in security too must be dismissed.

Security for costs

[41] The applicants seek security for costs in defending the respondent's claims in convention pursuant to Rule 47 read with section 4(1) of the Admiralty Act. According to applicants the entitlement to demand security arises out of section 8 of the Close Corporations Act.

[42] In *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) SA 620 (SCA) Brand JA dealing with the equivalent provision in the erstwhile Companies Act said the following at par 7:

> The section plainly requires a two stage enquiry. At the initial stage, the question is whether the applicant for security had established, by credible testimony, that the body corporate, if unsuccessful, will not be able to pay the applicant's costs in the main proceedings. If the applicant fails to meet this threshold requirement, that is the end of the matter. The application is bound to be refused. If, on the other hand, the Court is satisfied that such reason to believe exists, it must, at the second stage, decide, in the exercise of the discretion conferred on it by the section, whether or not to compel security (see eg *Vumba Intertrade CC v* A *Geometric Intertrade CC* 2001 (2) SA 1068 (W) in para [8]).

[43] In respect of the first requirement the applicants rely upon the content of a balance sheet of the respondent dated 31 January 2012. This reflects total assets of R486 431.30. Its liabilities are reflected as being R367 764.81 indicating a net equity balance in the amount of R118 666.49. It is submitted that this balance sheet does not take into account the respondent's own legal costs (in an amount in excess of R250 000.00) and a contingency for payment of an amount of R350 000.00 in the event that the respondent is unsuccessful in its claims against the applicants, this being the balance of the charter fee which it is submitted would necessarily then become payable to the applicants. Based on these figures it is submitted that the respondent will be unable to meet any costs order that may be made against it.

[44] The applicants also rely upon a balance sheet, which appears from the papers to be a provisional balance sheet, dated 30 September 2012, in which the respondent's assets are valued at R646 455.28. As against this its liabilities, including members' loans and current liabilities, are recorded as being R499 264.52. Respondent's assets exceeds its liabilities in an amount of R147 264.52. In the light of the fact that no provision is made for respondent's contingent liabilities, it is submitted that the respondent will not, on the basis of these figures be able to meet any costs order made against it.

[45] The respondent denies that it will be unable to meet any costs order that may be made against it. It points to its most recent income statement for the period 1 March 2012 to 30 September 2012 which records a net profit in excess of R200 000.00. The respondent submitted that in the light of its net asset value and its net profit for the period accounted for that there is no reasonable risk that it will be

unable to meet any costs order that may be made against it and that accordingly the applicants have failed to meet the minimum requirement for the granting of an order for security.

[46] In determining whether the respondent will be unable to satisfy a cost order it must be assumed that respondent will be unsuccessful in its claims since it is only then that a costs order would be made against it (see *The Dias Chase Manhattan Bank NA v Dias Compania Naviera SA* SCOSA B82 (D) at B86 G-H). This would have the consequence that the balance of the charter fee payable to the second applicant would be recoverable, placing additional strain on the respondent's financial resources.

[47] In the light of the evidence tendered I shall accept that the applicants have made out a case that the respondent may be unable to meet a costs order against it should the applicants succeed in their defence of the claims in convention. That, however, is not the end of the matter. The question arises whether in the exercise of this court's discretion the respondents should be ordered to provide security for the applicants' costs.

[48] In determining this aspect regard must be had to the fact that the respondent is an *incola.* It is well established that an *incola* plaintiff will only in exceptional circumstances be ordered to provide security for costs in a suit against a *peregrinus.* The discretion to grant such order is to be exercised sparingly (see *Santam Insurance Co Ltd v Korste* 1962 (4) SA 53 (E)).

[49] In *Haitas and Others v Port Wild Props (pty) Ltd* 2011 (5) SA 562 (GSJ) the court, whilst accepting that the discretion is sparingly exercised against an *incola* plaintiff, nevertheless found that the exercise of the discretion formed part of the court's inherent jurisdiction to regulate its own proceedings and to ensure that justice is done between the parties. In that matter it was common cause that the plaintiff corporation was insolvent. The court stated, at par 13, that:

> Having regard to the common-cause facts as stated above, the natural question that follows is whether the interest of justice would be served by requiring the plaintiff in the present matter, to file security for costs. The inevitable answer is that the interest of justice would be served in requiring the plaintiff to furnish security for costs in terms of rule 47. It is inimical to the interest of justice to expect the plaintiff to proceed with the matter to its finality, well knowing that in the event that the defendants succeed and an adverse costs order is made against the plaintiff, such costs order would not be satisfied. In these circumstances it would also be unfair, unjust and inequitable that an impecunious and insolvent plaintiff would be allowed to proceed with the trial while not on risk. The approach would encourage *incola* and insolvent plaintiffs to unnecessarily embark on litigation with a clear knowledge that they have nothing to lose. Vexatious litigation would be the order of the day. In these circumstances, it would only be the defendants who would be on risk with regard to costs. This, in my view, is not in the interest of justice. The fact that there is no statutory exception in the present Companies Act cannot defeat the court's inherent power to regulate its own process.

[50] There is no suggestion in this matter that the institution of proceedings by the respondent is reckless or vexatious, nor is there any suggestion that the claims are without foundation (cf. *Ramsamy NO v Maarman 2002(6) SA 159(C) at 172I*). There is accordingly no basis to conclude that the defendants require protection, on this basis, in the interests of justice.

[51] It must also be considered that an order to provide security for costs implicates a plaintiff's right of access to court and may have the effect of precluding a plaintiff from pursuing a legitimate claim. Although the respondent relied upon this as a basis for the exercise of the court's discretion against the granting of security, it did not contend that it would be unable to furnish security.

[52] As noted in *MTN Service Provider* (supra) at par 20:

> A plaintiff company that seeks to rely on the probability that a security order will exclude it from the Court, must therefore adduce evidence that it will be unable to furnish security; not only from its own resources, but also from outside sources such as shareholders or creditors (see eg *Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd (No 1)*1997 (4) SA 908 (W) at 920G - J; *Keary Developments* at 540*f - j*; *Shepstone & Wylie* at 1047A - B; *Giddey NO* in paras [30], [33] and [34]).

[53] In the light of the absence of such evidence the consideration that an order for security may implicate the respondent's right of access to court does not preclude the exercise of a discretion in favour of the applicants.

[54] A final aspect bears consideration. The respondent argued that the applicants' delay in prosecuting a claim for security for costs militates against the granting of such an order. It was submitted that Rule 47(1) requires that an application for costs be instituted as soon as practicable after the commencement of the action. The action commenced on 20 July 2011. It was submitted that on the applicants' own version the question of security, both for the claims and for costs, arose consequent upon a meeting held between the parties in November 2011. Notwithstanding this the application for security was made in October 2012 on the eve of the trial which was then enrolled for 1 November 2012. The respondent argued that no explanation for the delay was furnished.

[55] The founding affidavit makes it clear that between November 2011 and May 2012 the parties were engaged in discussions relating to the furnishing of security to secure the release of the vessel as well as a dispute, in the correspondence, as to the quantum of such security. During July 2012 the defendant was involved in separate legal proceedings against the port authority to secure the release of the vessel. It is stated that from July 2012 to September 2012 the applicants' counsel was apparently

not available to prepare the application. In my view this does not constitute a proper explanation for the delay. In my view the delay in bringing an application for security for costs is a factor which is to be weighed in the exercise of my discretion regarding such order.

[56] Having regard to all of the circumstances of this matter and in particular that no exceptional circumstances are shown which would warrant an order for security against the respondent, I am of the view that the application for security for costs should be dismissed.

[57] Finally, in respect of the costs of the application it was submitted on behalf of the respondent that the reserved costs of the trial which was to proceed on 1 November 2012 should be paid by the applicants since that matter did not proceed because of the late institution of these proceedings. Although I have found that the delay in instituting this application was not explained adequately it is not for that reason alone that the applicants' applications are unsuccessful. I am unable to find that the trial would have proceeded but for the institution of this application. To my mind that is a matter that is best determined by the trial court in due course and I decline to make the order sought by the respondent.

[58] In the result I make the following order:

1. The applicants' application for reduction of security furnished by the respondent is dismissed.

2. The second applicant's application for security for its claim in terms of section 5(2) of the Admiralty Jurisdiction Regulation Act, 1983 is dismissed.

3. The applicants' application for security for costs in respect of the defence of the respondent's claim in convention is dismissed.

4. The applicants are ordered to pay the costs of the application.

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G GOOSEN
JUDGE OF THE HIGH COURT

APPEARANCES:

FOR APPLICANTS:	T Crookes instructed by Lamprecht Attorneys c/o Cooper Conroy Bell & Richards
FOR RESPONDENT:	P. J Wallis instructed by Drake Flemmer Orsmond Attorneys