REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT
DURBAN
REPUBLIC OF SOUTH AFRICA
(EXERCISING ITS ADMIRALTY JURISDICTION)

CASE NO.A55/2007

NAME OF SHIP: mv "MSC GINA"

In the matter between

MEDITERRANEAN SHIPPING COMPANY SA Plaintiff

and

CAPE TOWN IRON & STEEL WORKS (PTY) LTD Defendant

In the matter of an application in terms of section 5(3) of the Admiralty Jurisdiction Regulation Act 105 of 1983

J U D G M E N T

Del. 22 February 2011

WALLIS J.

[1] Mediterranean Shipping Company SA ('MSC') carries on business as an ocean carrier from its base in Geneva, Switzerland. It has sued to recover from the defendant freight charges in respect of the carriage of containers from Cape Town to Tema in Ghana. The action is being defended on the basis that Angeline Shipping Services CC, the freight forwarder that booked the cargo, is the party liable to pay the freight.

[2] In December 2010, when preparations for the trial were underway, MSC's attention was drawn to a letter published in Business Day on

23 November 2010. In general the letter concerned the government's industrial policy. The impetus for writing the letter, however, was said by its author to be that:

'Cisco, the Cape Town Iron and Steel Corporation switches off its electric arc furnaces for the last time on December 3 – after fifty years as a producer of reinforcing bar and billet. It served the Western Cape and many Southern African Development Community countries. Several hundred decent and productive jobs will be lost permanently. A few thousand jobs will be indirectly affected.'

The letter goes on to refer to Cisco closing and being 'the first to go under'. MSC believed that this letter referred to the defendant and understandably became concerned that pursuing an action against an entity that was on the point of closing down would be a waste of time and money. Accordingly on 13 December 2010 its attorney wrote a letter to the defendant's attorney saying:

'We have been advised that your client is closing down shortly. Please advise what the situation is and if your client would be in a position to satisfy a judgment and/or an adverse costs order.'

[3] The issue was again raised at the pre-trial conference on 22 December 2010. The defendant's attorney indicated that he had no instructions but would revert by 7 January 2011. On that date he replied saying:

'... my client fails to see the relevance of the assertions made and the questions posed therein, to the merits of the case and accordingly declines to address these points. They have no bearing on the trial whatsoever, which is now less than a month away, and both parties appear to be ready to proceed on 2 February.'

Thereafter followed ten paragraphs in which the defendant's attorney addressed on an abstract basis the question of security for costs.

[4] It comes as no surprise that the response by MSC was an urgent application for a security arrest in terms of s 5(3) of the Admiralty

Jurisdiction Regulation Act 105 of 1983, as amended, (the AJRA). In response to that application a notice was filed stating that:

'(1) The applicant has made out no case for urgency.

(2) The applicant has made out no case that the above Honourable Court has jurisdiction to determine the Application.

(3) The applicant has failed to identify the property to be arrested and to satisfy the requirements for a security arrest in relation thereto.

(4) The applicant has not made out a case that it has a "genuine and reasonable need" for security.'

[5] The need to deal with the application urgently fell away because the trial was adjourned. Arrangements were then made for it to be argued in the ordinary Motion Court. The argument proceeded on the basis of the second, third and fourth points in the notice.

[6] It is by now well established that a person seeking the arrest of property in terms of s 5(3) of the AJRA must show a genuine and reasonable need for security.[1] This means that the person seeking the arrest must show that it has a genuine and reasonable apprehension that the party whose property it seeks to arrest will not satisfy a judgment or award made against it.[2] The party seeking the arrest must prove this on a balance of probabilities.[3]

[7] In addressing this point Mr van Eeden, who appeared for the respondent, placed much reliance on certain passages from the judgments in *P & O Nedlloyd Limited v United African Lines (Pty) Limited*[4] and

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[1] *Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris* 1989 (3) SA 820 (A) at 833 A.

[2] *MV Orient Stride: Asiatic Shipping Services Inc v Elgina Marine Co Limited* 2009 (1) SA 246 (SCA) para [7].

[3] *Bocimar NV v Kotor Overseas Shipping Limited* 1994 (2) SA 563 (A) at 583 E-F.

[4] Shipping Cases of South Africa (SCOSA) p258 (C).

Ever Growth: Green Africa Shipping (Pty) Limited v Hifu Electronic Trading CC[5]. I have not, however, found these of much assistance as the comments were clearly made in the light of the facts before the court in those two cases and those facts differ markedly from the facts before me. It is the facts of this case that must be addressed. What they show is that there was a statement by a person writing to a well-respected business newspaper that the operations of an entity called Cisco were to be closed. Cisco was identified as the Cape Town Iron and Steel Corporation and it was said to have been in business for some fifty years but was now 'going under', with many staff losing their jobs and further indirect ripple effects on employment elsewhere in the economy. The information was clearly hearsay but hearsay evidence is admissible in admiralty proceedings. In the founding affidavit it was expressly stated that the business that was closing was the defendant's business. In other words, the slight difference between the name of the firm mentioned in the letter in the newspaper and the name of the defendant is, according to the deponent to that affidavit, to be disregarded because the defendant is the entity mentioned in the letter. The basis for the claim for security is that, as the defendant appears to be closing down, the plaintiff reasonably fears that it may be left with a hollow judgment and no security for its claim.

[8] Mr van Eeden attacked this as mere speculation not based on fact. However MSC did make the factual allegations I have identified and the defendant on two occasions refused to deal with them. It first refused to deal with them in the e-mail of 7 January 2011. It again refused to deal with them when it decided not to deliver affidavits in response to the application. That was an extraordinary approach to adopt if the facts on which MSC was relying were incorrect. It is well established that, where

[5] SCOSA 251 (D).

the matter in question is peculiarly within the knowledge of the opposite party, less evidence will suffice to establish a *prima facie* case than would under other circumstances be required.[6] When the party having knowledge of the facts and in a position to rebut them, if they are capable of rebuttal, chooses not to do so, that in itself is a factor that reinforces the *prima facie* case already before the court.[7]

[9] In my view the present is a case where those principles apply. I find it quite extraordinary, if the true situation is that the defendant is still in business and possessed of significant assets that would enable it to pay any judgment granted against it, that it did not say that. After all the amount of the plaintiff's claim is not large. The security sought is for approximately R750 000. That is not a vast sum in relation to a business that has been operating an iron and steel works for fifty years with established furnaces and an export business. If the business is continuing in operation why not say so? Why not indicate that its trading operations are such that it will be able to pay any judgment? I am not saying that the evidence in this case was strong. It might have been sufficient to rebut it to point to relatively limited assets or trading operations or to the existence of a controlling shareholder, such as a major public company of which it is a subsidiary, as grounds for rebutting the plaintiff's fears. However, the defendant chose not to do this.

[10 It is instructive to compare the stance adopted by the defendant in this case with the stance of the appellant in the *Orient Stride*. That too involved a security arrest. Elgina Marine had claims under a charter party

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[6] *Union Government (Minister of Railways) v Sykes* 1913 AD 156 at 173-174; *Marine & Trade Insurance Co Limited v Van der Schyff* 1972 (1) SA 26 (A) at 39A-40D.
[7] *Hasselbacher Papier Import and Export (Body Corporate) and Another v MV Stavroula* 1987 (1) SA 75 (C).

against Asiatic Shipping that it was pursuing in arbitration proceedings in the United Kingdom. The defence to the claims was that Asiatic Shipping had entered into the relevant charter party as agents for another entity described as PIL. Asiatic Shipping accordingly alleged that PIL was a party to the charter party and the arbitration agreement. PIL initially sought to join in the arbitration for the purposes of a counter-claim but refused to be joined as a party for the purposes of Elgina Marine's claim under the charter party. Thereafter they distanced themselves from the proceedings, rejecting a notice of appointment of an arbitrator on the grounds that they were not party to an arbitration agreement with Elgina Marine. Against that background Elgina Marine sought an attachment of bunkers and freight by way of security in terms of s 5(3) of the AJRA. Asiatic Shipping's only response to the application was to say that it had 'more than sufficient assets to satisfy any judgment' although it gave no details of those assets. Scott JA said[8]:

'Having regard to the nature of the application and PIL's change of stance, one would have expected that if Asiatic had assets, it would in reply at least have given some indication of their nature and extent. Had it done so, its response may well have put paid to the application for security. But it declined to do so. Instead, it contended that its financial standing was "now a moot point because [Asiatic] has in fact secured [Elgina's] claim". This evasive response was in itself sufficient to cause concern to a reasonable person in the position of Elgina, particularly when regard is had to the fact that it was PIL and not Asiatic that had provided the security.[9]'

[11] In my view the position in the present case is similar to that which prevailed in the case of the *Orient Stride*. Accordingly I hold that MSC discharged the onus of showing that it had a genuine and reasonable need for security.

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[8] In para [16]

[9] That is the security for the release of the arrested bunkers.

[12] The other two points taken by the defendant are linked. The contention that this court lacks jurisdiction to determine the application is based on the proposition that a court can only order an arrest in terms of s 5(3) of the AJRA where the property to be arrested is within the territorial jurisdiction of the court or, possibly, is property that is likely to come into the jurisdiction after the making of the order. The defendant contends that the plaintiff has not established jurisdiction on this footing in part at least because it has not identified the property that it seeks to have arrested. Identification of the property to be arrested is, so the defendant contends, a fundamental requirement for an application under s 5(3) of the AJRA.

[13] The order prayed by the plaintiff reads:

'The Sheriff for the district of Durban central or other such Sheriff having jurisdiction be and is hereby authorised and directed to arrest the property of Cape Town Iron & Steel Works (Pty) Limited, the said arrest to be in terms of s 5(3) of the Admiralty Jurisdiction Regulation Act ... for the purposes of providing security for the applicant's claim of R317 481 together with a further amount of R200 000 for interest and R150 000 for costs arising out of a contract of carriage, such claims being pursued by the applicant against the respondent in the KwaZulu-Natal High Court (exercising its Admiralty Jurisdiction) under Case No.A55/1007.'

The contentions on behalf of MSC, in response to the points raised by the defendant, are that the court has jurisdiction by virtue of the fact that the action is proceeding before it and that it is permissible for a security arrest of property to be couched in the terms set out in the order.

[14] I am by no means certain whether the defendant's point about the jurisdiction of this court is correct. The action is one *in personam* in which the court has jurisdiction because the defendant, as a company

registered and incorporated in South Africa, has its registered office in the Republic.[10] The court is accordingly entitled in these proceedings to exercise its admiralty jurisdiction in relation to the defendant. Its powers in that regard are set out in s 5 of the AJRA each of the sub-sections of which (other than sub-section (4)) commences with the words:

'A court may in the exercise of its admiralty jurisdiction ...'

In this case the court is asked to exercise the admiralty jurisdiction that it has over the respondent to order the arrest of the respondent's property by way of security in terms of s 5(3) of AJRA. Whilst the claim for security is 'a separate and ancillary issue between the parties, collateral to and not directly affecting the main dispute between the litigants',[11] the court is being asked to order security as an ancillary to the action at present pending before it and in the exercise of a jurisdiction that already exists. It seems slightly odd to say that the court nonetheless lacks jurisdiction to deal with this issue if there is property susceptible to arrest within the Republic but outside its area of jurisdiction. It is after all empowered to order that security be provided for these proceedings in terms of s 5(2)(b) of the Act.

[15] Mr van Eeden drew my attention to the provisions of s 4(4)(c) of the AJRA in regard to the circumstances in which a court may make an order for the arrest of property not within its area of jurisdiction. He stressed in particular the provisions of s 4(3)(c)(i) the relevant portions of which read:

'A court may make an order for the arrest or attachment, to found jurisdiction, of property not within the area of jurisdiction of the court if

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[10] S 3(2)(e) of the AJRA.

[11] Per *Van den Heever J in Ecker v Dean* 1937 SWA 3 at 4; *Shepstone & Wylie and Others v Geyser NO* 1998 (3) SA 1036 (SCA) at 1041 C-F.

(aa) (aaa) that property is in the Republic or is likely to come into the Republic after the making of the order; and

(bbb) no court in the Republic otherwise has jurisdiction in connection with the claim or can otherwise acquire such jurisdiction by an arrest or attachment to found jurisdiction; or

(bb) other property within the area of jurisdiction of the court has been or is about to be arrested or attached to found jurisdiction in connection with the same claim.'

There are, however, a number of difficult questions of interpretation in regard to this section. For example, it is unclear whether it relates at all to a security arrest under s 5(3) of the Act, or whether the conjunction of the reference to an arrest and an attachment to found jurisdiction means that the section relates only to the commencement of proceedings, either *in rem* or *in personam* under s 3 of the AJRA. In view of those complexities and because I think the third point raised by the defendant must succeed, I prefer to express no view on the jurisdictional question but will assume that this court has jurisdiction to make the order sought by the plaintiff.

[16] Mr McIntosh, who appeared for the plaintiff, submitted that it is not necessary to identify property or prove ownership in order to obtain a security arrest under s 5(3) of the AJRA. He submitted that in terms of s 26(1) of the Supreme Court Act[12] the civil process of a provincial or local division runs throughout the Republic and may be served or executed within the jurisdiction of any division. Accordingly, just as a writ of execution can be addressed to any sheriff of the High Court for the purpose of attaching property and executing on a judgment, so he submitted, an order granted in the terms sought by the plaintiff can be

[12] Act 59 of 1959.

executed against property owned by the defendant anywhere in the Republic.

[17] In my view this argument is fallacious. The court is authorised in terms of s 5(3)(a) of the AJRA to:

'... order the arrest of any property for the purpose of providing security for a claim ... if the person seeking the arrest has a claim enforceable by an action *in personam* against the owner of the property concerned or an action *in rem* against such property ...'

This postulates, in the case of a claim enforceable by an action *in personam*, that the party seeking the arrest has a claim against an identifiable person and that such person is the owner of the property to be arrested. In the case of a claim enforceable by an action *in rem* it postulates that the property to be arrested is susceptible to having an action *in rem* instituted against it in respect of that claim. In both instances the party seeking the arrest must identify the claim and establish it on a *prima facie* basis. That was decided in the *Thalassini Avgi* case.[13] In the *Bocimar* case, *supra,* Corbett CJ said that in an attachment to found or confirm jurisdiction the onus is upon the applicant to prove on a balance of probabilities that the property to be attached belongs to the respondent and that the same rule applies to applications to arrest property under s 5(3) of the AJRA.[14] If the property to be arrested is not identified in the application and the order this requirement cannot be satisfied. An order in the form sought by MSC amounts to the court saying that if the sheriff can find property owned by the defendant it is to be arrested and held as security for the applicant's claim. That is not an order for the arrest of property. It is a licence to the sheriff to engage in a fishing expedition. It is not an order contemplated in s 5(3) of the AJRA.

[13] At 832 I-J.
[14] At 581 D-F.

[18] The problem with this approach is perhaps best illustrated by the case where the party seeking the arrest says that the claim is one *in rem* against the property to be arrested. In order to make that case it is obviously essential to identify the property that one wishes to arrest. In the absence of identification it cannot plausibly be contended that there is an action *in rem* against any property. Nor can it be permissible to authorise the Sheriff to arrest any property that can be found against which an action *in rem* will lie at the instance of the arresting party. That is clearly beyond the Sheriff's remit. In any event it inverts the sequence of events contemplated in s 5(3). That sequence involves the court first making an order and thereafter the Sheriff executing upon it by arresting property. The Sheriff cannot do that unless the property is identified in the order. The position in the case where the arresting party contends that it has a claim enforceable by an action *in personam* against a named respondent cannot be different from the situation where the arresting party says that the claim is enforceable by an action *in rem*.

[19] In support of his argument and perhaps with a view to hoisting me with my own petard Mr McIntosh cited a passage from my book *The Associated Ship and South African Admiralty Jurisdiction* in which I wrote:

'The security arrest under s 5(3) is a procedure whereby property can be arrested and detained and ultimately, if no alternative security is provided, sold to satisfy a claim. In that sense it is more closely akin to the process of execution than it is to any form of action.'[15]

Whilst no doubt I will in the future be obliged to modify or recant some of the views I have expressed as an author, on this occasion the relevant

[15] Malcolm Wallis, *The Associated Ship and South African Admiralty Jurisdiction*, 309.

passage is taken out of context because it ignores the passage that precedes it. My concern was to deal with the statement in *The mv Zaltini Piasatzi : Frozen Food International Limited v Kudu Holdings (Pty) Limited and Others*[16] that an arrest under s 5(3) of the AJRA is a proceeding *in rem* directed at bringing the ship before the court and the underlying notion that it is therefore to be equated with an action *in rem*. That view is, with respect, incorrect and I accordingly wrote:

'It will I think be apparent from the fact that the security arrest is a special institution under the South African Act that it is inappropriate to speak of a security arrest, whether of the ship concerned or of an associated ship, as a proceeding *in rem* or as a proceeding *in personam*, at least insofar as those expressions convey meaning in regard to different forms of action in admiralty proceedings in South Africa. It is correctly described as a "stand alone" procedure unconnected, unlike similar provisions elsewhere with any action before the South African court.'

It is in that context that I suggested that a security arrest is more closely akin to a procedure by way of execution than to an action *in rem* because it may lead to the arrested property being sold. I added that it is *in rem* only in the sense that it is directed at a particular asset, whilst suggesting that to describe it in that way leads to confusion.

[20] Whatever similarities there may be between a security arrest and a process by way of execution they do not dispense with the need for an applicant for such an arrest to identify the property that it seeks to have arrested. It is only when it does so that a court can be satisfied both that such property exists and is owned by the person against whom the claim *in personam* lies or is vulnerable to an action *in rem*. In addition not to identify the property that is to be arrested deprives the other party, at the stage of arrest, of the undoubted right to resist the arrest on the grounds that it is not the owner of the property to be arrested.

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[16] 1997 (2) SA 569 (C) 574 G-H.

[21] The application in terms of s 5(3) must therefore fail and be dismissed with costs. Counsel accepted in the course of argument that the costs of the appearance on 11 February 2011 must follow the result.

[21] The order that I make is that the application is dismissed with costs, such costs to include the reserved costs of the hearing on 11 February 2011.

M J D WALLIS

DATES OF HEARING	15 FEBRUARY 2011
DATE OF JUDGMENT	22 FEBRUARY 2011
PLAINTIFF'S COUNSEL	MR K C McINTOSH
PLAINTIFF'S ATTORNEYS	SHEPSTONE & WYLIE
DEFENDANT'S COUNSEL	MR P A VAN EEDEN
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