

**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL LOCAL DIVISION, DURBAN  
(Exercising its Admiralty Jurisdiction)**

**CASE NO. A10/2018**

In the matter between:

**NEWBROOK SHIPPING CORPORATION**

**APPLICANT**

and

**NADELLA CORPORATION**

**RESPONDENT**

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**ORDER**

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**The following order shall issue:**

1. The order granted by this court on the 23<sup>rd</sup> December 2015 under case number A74/2015 is hereby confirmed to the extent that the respondent is to furnish security in the sum of US\$827 849 within 30 days from date hereof failing which its defence to the action in the present case number will be struck out.
2. The costs of this application are reserved for decision by the trial court.
3. The counter-application is dismissed with costs.

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**JUDGMENT**

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**Laing AJ:**

[1] This is an application in terms of rule 19(4)(a) of the Admiralty Proceedings Rules by Newbrook Shipping Corporation (Newbrook) against Nadella Corporation (Nadella) for the latter's defence to be struck out in view of its failure to comply with the orders of this court. It is met with a counter-application in terms of s 5(2)(d) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the Act), that the security ordered in favour of Newbrook for the damages suffered because of the arrest be discharged or reduced to nil.

### **History**

[2] On the 16<sup>th</sup> September 2015, Nadella obtained an ex parte order (the first order) in terms of s 5(3)(a) of the Act for the arrest of the *MV Falcon Traveller* (the *Traveller*) at Durban. This was done for the purpose of providing security for claims which Nadella intended advancing in arbitration proceedings in Singapore against Falcon Carrier Shipping Ltd. The security was paid and the ship released. It is now alleged by Newbrook that both the claims and security asked for, were excessive, and that there was no reasonable and probable cause to obtain the order of arrest.

[3] Newbrook, apparently the parent company of Falcon Carrier Shipping Ltd, issued summons for the damages sustained as a result of this arrest. According to s 5(4) of the Act:

'Any person who makes an excessive claim or requires excessive security or without reasonable and probable cause obtains the arrest of property or an order of court, shall be liable to any person suffering loss or damage as a result thereof for that loss or damage.'

This claim for damages by Newbrook is currently pending in this court. Pending finalisation of the claim, Newbrook has made application for security for damages sustained.

[4] On the 23<sup>rd</sup> December 2015, an order was granted by this court (the second order) in terms of s 5(2)(b) of the Act, directing Nadella to provide security for Newbrook's claims in the sum of US\$827 849. The order reads:

'a). The applicant (NADELLA) is directed to provide security for the claims by the second respondent in the sum of US\$827 849.00.

b). The registrar of this court is directed to determine the amount of security for legal costs appropriate for the second respondent's defence of the applicant's application under case number A74/2015.

- c). The applicant is directed to provide security to the satisfaction of the registrar of this court, for the amounts referred to above within 7 days of this order or such determination.
- d). The costs of this application for counter security are to be paid by the applicant including the costs of senior counsel.'

Nadella has to date failed to provide the security ordered in terms of this court order.

[5] The first order was set aside on the 1<sup>st</sup> April 2016 at the instance of Newbrook, with an order that Nadella pay the costs of the applications (the third order).

[6] In view of Nadella's failure to comply with both the second and third court orders, the provisions of rule 19(4)(a) were invoked and are the subject of the present application.

[7] Rule 19 of the Admiralty Proceedings Rules provides:

'(1) On the application of any person the court may abridge or extend any period of time and may advance or postpone any date in respect of any matter for which a time or date is laid down in these rules, the Uniform Rules as applicable to admiralty proceedings, any notice or any order of court or in any other way.

(2) Any application in terms of subrule (1) may be made on notice to all interested parties.

(3) If any person has not complied with a notice given in terms of these rules or the Uniform Rules, any interested party may apply in the manner provided for in subrule (2) for an order that there be compliance with the notice.

(4) (a) If any party has not complied with an order of court, any interested party may apply for an order that the claim or defence or participation in the action of any person not so complying be set aside and struck out and that the said person be dealt with as being in default.

(b) In any such application the court may so order, to make such other order as the court deems fit.'

Effectively Newbrook seeks the striking out of Nadella's defence to its claims in view of its failure to comply with the court orders.

### **Current applications**

[8] On the 8<sup>th</sup> October 2019, a rule nisi (the fourth order) was issued by this court for Nadella, to show cause as to why its defence to this action for damages should not be struck out, in consequence of its failure to furnish security and to pay costs of R882 311.45.

[9] On the 19<sup>th</sup> November 2019, Nadella brought a counter-application that it be relieved from providing security as per the second order, and that the court exercise its authority in terms of rule 19(4)(b).

[10] It appears the main point of Nadella's contentions are that the second order was granted on the basis for a claim for excessive security, and not that it (Nadella) did not have reasonable and probable cause to arrest the ship. Under the circumstances, it provided a guarantee restricting Newbrook's claims to the damages it can prove as a result of its claim for excessive security. This is opposed by Newbrook, who insists on security as provided in the second court order.

[11] On the 4<sup>th</sup> June 2021, the application and counter-application were adjourned for three months on the basis that Nadella furnishes security as per the second order, and pays the balance of Newbrook's legal costs, including any amounts set off by it (Nadella). In the event of Nadella failing to comply, Newbrook could set the main and counter-applications down on the opposed motion court roll. Nadella was also ordered to pay the costs of that application (the fifth order).

[12] Nadella alleges it has provided a letter of undertaking as security in terms of the second order and the costs have been set off, hence it requires the order to be discharged. This is disputed by Newbrook, hence the opposed application before me.

### **Compliance**

[13] There is a dispute as to whether or not Nadella has complied with the second and third court orders. Nadella chose to apply its own interpretation to the second order, which is somewhat restrictive, in that it applies, so it says, only to damages that arise out of excessive security.

[14] There is a huge degree of mistrust between the parties despite them belonging to one family. Nadella has restricted the guarantee and believes that the order in its present form may lead to an abuse.

[15] I raised the concern I have with rule 19(4)(a) been as wide as it is and the extreme prejudice that may result in its enforcement. Effectively, if you have a bona fide defence in one matter, it can be struck out merely because you failed to follow an order in a different matter. This will effectively shut the door for a litigant desiring to place its version before the court.

[16] It was stated by Solomon JA in *Western Assurance Co., v Caldwell's Trustee* 1918 AD 262 at 273:

'The courts of law are open to all, and it is only in very exceptional circumstances that the doors will be closed upon anyone who desires to prosecute an action.'

[17] Nadella had an opportunity to appeal the second order if it was final, or have it varied if it was an interlocutory order. It chose to do neither despite the dispute in the interpretation of the second order between the parties.

[18] Uniform rule 42 provides as follows:

(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

- (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
- (b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
- (c) an order or judgment granted as the result of a mistake common to the parties.

(2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.

(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.'

[19] Uniform rule 42(1)(b) thus provided relief if Nadella felt that the second court order was ambiguous. It did not avail itself of the opportunity, instead it sought to rely on an interpretation that suited itself. It is not the duty of this court to act as a court of appeal if the order was indeed final. Nadella expects this court to interpret the order on the basis that the order only referred to the question of excessive security and did not refer to the question of whether it had reasonable and probable cause. The second court order says 'provide security for the claims', referring in my view to more than one claim. In any event, in view of Nadella's failure to challenge the order in any way, it stands as it is. Furthermore, the fourth order clearly put Nadella on terms as to when the security should be provided and is more definitive and final in nature.

### **Counter-application**

[20] Nadella seeks that the order that it provide security be discharged on the basis that it has provided the relevant security. Section 5(2)(d) of the Act states:

'notwithstanding the provisions of section 3 (8), order that, in addition to property already arrested or attached, further property be arrested or attached in order to provide additional security for any claim, and order that any security given be increased, reduced or discharged, subject to such conditions as to the court appears just;' (My emphasis).

[21] Newbrook has submitted that this section is applicable when security is already "given" and does not apply when it has not been given. In this instance, no security has been given for the court to exercise its powers of variation in terms of s 5(2)(d) of the Act.

[22] At the hearing of this application Nadella requested that its counter-application be adjourned sine die as on the 2nd October 2021 it provided Newbrook with a letter of undertaking. The third paragraph of the letter reads:

'AND WHEREAS on the 23<sup>rd</sup> December 2015, pursuant to an order by the Honourable Justice Lopes, Nadella was ordered to provide the owner of the vessel, Newbrook Shipping Corporation (Newbrook), with counter security in the amount of US\$827,849 (Eight hundred and Twenty Seven thousand Eight Hundred and Forty Nine US Dollars)(the security amount) in respect of a possible claim for damages to be advanced in an action by Newbrook against Nadella in terms of section 5(4) of the Act on the basis that the security sought by Nadella was excessive in the respects identified in the judgement of Mr Justice Lopes (The excessive Claims).'

[23] The security tendered clearly restricts the ambit of the second order to that of excessive claims. It does not speak of damages for wrongful arrest for example. The watered-down value of this security provided does not assist Nadella in its counter-application, neither can it be argued that it can be regarded as security "given" in terms of s 5(2)(d) as it does not comply with the terms of the second order mentioned above. Under the circumstances the counter-application cannot succeed.

### **Set off**

[24] Nadella does not dispute, and in fact cannot dispute the taxed bills of costs due by it in the amount of R882 311.45 in respect of case number A74/2015, and R30 058.33 and R15 733.04 in respect of Supreme Court of Appeal case numbers 173/2016 and 018/2016. Instead, Nadella indicates that these amounts have been set off and all that is due by it is an amount of about R600 000. The affidavit by Nadella's attorney, Mr Nicholas Veldman, confirms the various amounts of the taxed costs due by Newbrook to be the sum of about R322 604.58. He indicates that there are other

bills that still need be taxed which will have the effect of setting off the complete balance due by Nadella. There seems to be some merit in this suggestion as it was not seriously disputed by Newbrook. According to Mr *Mullins* SC, acting for Nadella, there is still a small amount that is due. The parties are in the best position to make this decision and it cannot be difficult to work out as to what is due by whom.

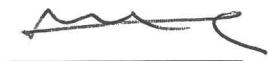
### **Costs**

[25] Both parties have requested that I make a punitive costs order in respect of this court application. There seems to be suggestions of perjury and fraud, not to mention the failure to abide by court orders. There are various cost orders against each other. It is apparent that the parties have a history of strife, which is concerning. Under the circumstances, I believe the trial court will be in the best position to make a punitive costs order if it is so warranted.

### **Order**

[26] The following order shall issue:

1. The order granted by this court on the 23<sup>rd</sup> December 2015 under case number A74/2015 is hereby confirmed to the extent that the respondent is to furnish security in the sum of US\$827 849 within 30 days from date hereof failing which its defence to the action in the present case number will be struck out.
2. The costs of this application are reserved for decision by the trial court.
3. The counter-application is dismissed with costs.



**Laing AJ**

**APPEARANCES**

Counsel for the applicant:

Miss Mills

Instructed by:

Norton Rose Fulbright South Africa Inc

Counsel for the respondent:

Mr Mullins SC

Instructed by:

Clyde and Company c/o Cox Yeats Attorneys

Date of Hearing:

8 October 2021

Date of Judgment:

8 NOVEMBER 2021