

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN
Exercising its Admiralty Jurisdiction**

Case No. AC50/2013

Name of vessel: **MV "KIANI SATU"**

In the matter between:

**THE OWNERS AND INSURERS OF THE CARGO
LADEN ON BOARD THE MV "KIANI SATU"**

Applicant

And

THE OWNER OF THE MV "KIANI SATU"	First Respondent
THE HULL AND MACHINERY INSURERS OF THE MV "KIANI SATU"	Second Respondent
THE PROTECTION AND INDEMNITY INSURERS OF THE MV "KIANI SATU"	Third Respondent
P & I ASSOCIATES (PTY) LIMITED	Fourth Respondent
THE MASTER AND CREW OF THE MV "KIANI SATU"	Fifth Respondent
ESMERALDA (ANTIGUA) SHIPPING LIMITED	Sixth Respondent

Judgment delivered Tuesday, 3 September 2013

LOUW, J

[1] This is the extended return day of a rule *nisi* issued by Davis, AJ on 13 August 2013. The applicants who seek the confirmation of the rule, are the owners and insurers of a cargo of 15,000 metric tons of Vietnamese white long grained rice ("the cargo") which was being carried on board the MV "Kiani Satu" ("the vessel") from Ho

Chi Minh City port, Vietnam to Tema, Ghana. The CFR value of the cargo is USD\$ 6 907 500.00.

[2] The first respondent is the registered owner of the vessel (“the owner”), the second to third respondents are the insurers of the vessel, the fourth respondent is a local representative of one of the insurers, and the fifth respondent is the master and crew of the vessel (“the crew”). The applicants intend to advance claims arising from the loss of the cargo in London arbitration proceedings against the contractual carrier who the applicants believed was the first respondent, the owner of the vessel. It subsequently came to light, however, that the vessel was the subject of a bareboat or demise charterparty concluded with a company named Esmeralda (Antigua) Shipping Limited of St Johns, Antigua, who was by agreement joined as a party, the sixth respondent, at the hearing on 23 August 2013. The fourth respondent and the master and crew, being the fifth respondents do not oppose the confirmation of the rule *nisi*. For the sake of convenience the first to third and sixth respondents who oppose the relief sought, will be referred to herein as “the respondents”.

[3] According to information obtained by the applicants, the vessel suffered a main engine breakdown on 3 August 2013 whilst the vessel was en route down the South African east coast. The vessel thereafter drifted for some time before anchoring. On 6 August 2013 the owners of the vessel concluded a towhire contract with the owners of the tug the Faimount Clacier. The tug arrived at the anchored position of the vessel on 7 August 2013 but despite attempts on 7 and 8 August

2013, it was unable to establish a tow connection with the vessel. The vessel ran aground on the coast on 8 August 2013. Thereafter various unsuccessful attempts were made by Smit Amandla Marine and SAMSA to refloat the vessel and on the morning of Saturday 17 August 2013 the vessel was finally refloated and was towed away from the coast. On 18 August 2013 it was clear that the vessel was taking water and on Monday 19 August 2013 it was reported that the vessel was sinking approximately 70 nautical miles off the coast and that the salvage crew that had been on board had been airlifted to safety. The vessel, together with the cargo were finally lost when the vessel sank in deep waters off the South African coast during the early hours of the morning of 21 August 2013.

[4] On 13 August 2013 Davis, AJ granted the applicant an order, *inter alia*, calling upon interested parties to show cause why an order should not be made in terms of section 5(5) of the Admiralty Jurisdiction Regulation Act 105 of 1983 as amended ("the Admiralty Act") directing that the respondents make available to the applicants' representatives certain documents for inspection and copying. These documents are described as follows in annexure A to the provisional order

- Engine log book – 3 months
- Deck log book – 3 months
- Deck log extract from 5 August
- Noon reports for this voyage
- Last 3 bunker Delivery Notes
- Last 3 fuel oil analysis [FOBAS or equivalent]
- Oil record book for last three months
- Tank plans for fuel oil, gas oil/diesel, lube oil and waste oils [all]
- Bunkering history including LSFO and storage tanks for LSFO
- Bunker tank status before and after the last three bunkerings
- Sea trial data
- Performance monitoring last 3 months
- Main engine overhaul records including:

- Cylinder/Piston overhauls
- Exhaust valve servicing, overhauls
- Fuel pump and fuel injector overhauls
- All component running hours
- Turbocharger overhauls
- Intercooler cleaning records

- Class surveys of main engine and auxiliaries
- Manual for main engine
- Spare gear requisitions last 6 months
- Stock control on used main engine spares and disposal records
- Quantity of spares ROB, for main engine including engine consumables
- All overhaul records of main engine, auxiliary engines, and engine remote control systems by external technicians, including OEM service engineers
- UMS procedures, [ISM]
- If UMS alarm records for the main engine, alarm records are required anyway
- General arrangement [ship]
- General arrangement [engine room]
- Capacity plan [ship]
- Tank plan [fuel oil, water, waste oils/sludge and water]
- Line drawings of fuel oil engine supply and bunker systems, lube oil, diesel fuel, water, sea water, compressed air
- Details of oil water separator and instruction manual
- Fuel oil purifier and filter arrangements of fuel oil systems, manuals
- Lube oils on board, types/lubrication schedule
- Last three lube oil analysis for main engine, line shafting and auxiliary engines
- Diagram of main engine control systems, remote/local
- Auxiliary engine service records and overhauls
- Auxiliary engine manuals
- Bell books deck and engine, plus the engine movement recorder
- Mates receipts for cargo
- Cargo plan
- All correspondence to and from the vessel during the relevant voyage

[5] Interested parties were also called upon to show cause why an order should not be made authorising the applicants to take the evidence of the master, the deck officers and the engineering officers of the vessel with regard to the circumstances surrounding the grounding of the vessel on 8 August 2013 and all matters related or incidental thereto. Sub-paragraph 2.2 of the order provides for the taking of the evidence of only the master, the deck officers and the engineering officers of the

vessel. It is, however, clear from the body of the founding affidavit that the applicants seek an order for the taking of the evidence of the master and all crew members of the vessel.

[6] The order provided further for interim relief in the form of an interdict restricting the removal of any documents taken off the vessel from the jurisdiction of this Court. The master and crew of the vessel were also interdicted and restrained from leaving this Court's jurisdiction.

[7] The respondents' objection raised in the papers to the citation of the applicants as the Owners and Insurers of the Cargo Laden on Board the MV 'Kiani Satu', on the basis that the citation is an inadmissible generic citation and are not a legal persona recognised by South African law, rendering the application a nullity, was not proceeded with in argument by Mr. Fitzgerald who appeared with Mr. Cooke for the respondents. The owner and the insurer are existing juristic persons which at best have been misdescribed. The citation of the applicants is acceptable and is consistent with the practice of this and other courts

[8] The further point raised in the papers by the respondents that this court has no jurisdiction to enjoin or to make any order against them, was also not proceeded with in argument. This court has jurisdiction to consider the application and to grant the order sought.

[9] The applicants seek an order for the production and inspection of the documents listed in annexure "A" to the provisional order and for an order authorising them to take the evidence of the master and crew on commission in terms of section 5(5) of the Admiralty Act read with Rule 14 of the rules governing the conduct of admiralty proceedings before this honourable Court (the admiralty rules) and to preserve such evidence to form part of the evidence to be placed before an arbitrator in arbitration proceedings that will take place in London. S 5(5)(a) of the Admiralty Act reads as follows:

(a) A court may in the exercise of its admiralty jurisdiction at any time on the application of any interested person or of its own motion-

(i) if it appears to the court to be necessary or desirable for the purpose of determining any maritime claim, or any defence to any such claim, which has been or may be brought before a court, arbitrator or referee in the Republic, make an order for the examination, testing or inspection by any person of any ship cargo, documents or any other thing and for the taking of the evidence of any person.

(iv) in exceptional circumstances, make such an order as is contemplated in subparagraph (i) with regard to a maritime claim which has been or may be brought before any court, arbitrator, referee or tribunal elsewhere than in the Republic, in which case subparagraphs (ii) and (iii) shall mutatis mutandis apply.

The relevant provisions of the Admiralty Rules, including admiralty rule 14 are:

(1) A court may at any time, whether before or after the issue of summons, make an order under section 5(5) of the Act, including the making of an order for the taking of evidence of any person named or otherwise identified (whether by description or otherwise) in the order,

with regard to any matter which may be relevant in any action pending or contemplated in the Republic and may in the order define the issues on which such evidence may be given and prescribe the procedure for the taking of such evidence, which may include- (a) the appointment of a commissioner to take the evidence concerned; (b) the duties and powers of the commissioner; (c) directions with regard to the venue of the commission hearing and the recording and preservation of the evidence taken; and (d) such other matters as the court may deem fit.

(2) In respect of any order made in terms of subrule (1) the following shall apply, unless the court otherwise orders:

(a) The attorney of record for the party applying for the order shall assist and carry out the directions of the commissioner with regard to the arranging of a venue for the taking of the evidence in terms of the order, for the recording and preservation of that evidence and for securing the attendance of the witnesses referred to in the order for the purpose of taking the evidence.

(b) Subject to any direction contained in the order for the taking of evidence-

(i) any person giving evidence may be examined, cross-examined or re-examined; and

(ii) the examination, cross-examination and re-examination of persons giving evidence shall be conducted in like manner as at the trial of an action or matter.

(c) Any person who applies for an order contemplated in this rule shall give security for any costs or expenses, including those arising from any delay, occasioned by the application and the carrying into effect of any such order.

(d) The cost of obtaining and carrying into effect the order of court shall

form part of the costs of the action in respect of which the relevant order of court has been issued.”

[10] Where, as is the case here, the claim is to be brought before an arbitrator in a foreign country, the court must first be satisfied that (a) there are *exceptional circumstances* and, (b) it appears to be *necessary or desirable* for the purpose of determining any maritime claim or any defence to such claim, that any document be examined or the evidence of any person(s) be taken. Once the court is so satisfied, the the court is empowered to make an order for the taking of the evidence or the examination of the documents in question.

[11] The object of section 5(5) has been considered in a number of authorities. In a leading work on maritime law it is stated to be to preserve evidence to form part of the evidence to be received in the litigation. It provides for the exercise of a statutory discretion conferred for the specific purpose of assisting maritime litigants with regard to the particular difficulty that they face in furthering claims and defences.¹ The extent of a court's power to grant relief in terms of section 5(5) of the Admiralty Act was considered by this Court in The MV Urgup², where Thring J described the purpose of the section as follows:

It seems to me that the real purpose of this sub-section is to provide a litigant or a prospective litigant with the relief which is more akin to the well-known so-called *Anton Pillar* order, or to the relief provided for in Uniform Rule 36(6) relating to the inspection of examination of property, the condition of which may be relevant to a matter in issue.

¹ G Hofmeyr Admiralty Jurisdiction 2nd ed (2012) at 232

² The MV Urgup: The Owners of the MV Urgup v Western Bulk Carriers Australia (Pty) Limited 1999 (3) SA 500 (C)

The object of an Anton Pillar order is not to sanction a search for evidence which may or may not exist and which may or may not go to found a cause of action but to preserve specific evidence which is shown to exist, which *prima facie* constitutes vital substantiation of a known cause of action whose concealment, loss or destruction is feared by the applicant for the order.³

[12] In the MV Ais Mamas: Seatrans Maritime v Owners, MV Ais Mamas and Anor, 2002 (6) SA 150 (CPD) and after an exhaustive survey of dictionary definitions and case law, Thring J held that the requirement of exceptional circumstances must be given a narrow rather than a wide interpretation and that to be exceptional, the circumstances must be '*markedly unusual or specially different*':⁴ Thring J also agreed with the statement of Jones, J in the Askania Nova: Insurers and Owners of the Cargo laden on board the MV Askania Nova, 1997 SCOSA E6 that:

... the purpose of requiring exceptional circumstances where the proceedings may take place in a different jurisdiction from our own is to ensure that no inroads are made in the rules of practice and procedure of some other jurisdiction, and for that reason the Court should be slow and indeed very careful to order an inspection and survey in the circumstances of this case in the absence of exceptional circumstances."⁵

[13] The application of the provisions of s 5(5) of the Admiralty Act was further considered in some detail by Cleaver, J in the matter of "The Owner of the Cargo Lately Laden on Board the MV "Ioannis NK" v The Master and Crew of the MV

³ at 508H-509G

⁴ 2002 (6) SA 150 (CPD) at 156H-157C.

⁵ *The Ais Mamas* (supra) at 157D-E.

"Ioannis NK" and 21 others.⁶ The suggestion that an applicant for relief in terms of section 5(5) of the Act must satisfy the requirements for an Anton Pillar was rejected by Cleaver J.⁷

[14] In the C Tashin: Koch Oil Marketing SA v Owner of the C Tashin, 2001 SCOSA E 129, Froneman, J held that s 5(5) is an unusual provision and that in determining its proper ambit the court should have regard to the realities of commercial shipping. While the purpose of s 5(5) is to ensure that evidence is preserved, it was unnecessary to demonstrate that all the normal requirements of the Anton Piller order have been complied with. In addition, Froneman J held that the need to preserve evidence that may be lost or destroyed may in a given case constitute the very exceptional circumstances required by s 5(5)(a)(iv).

[15] Mr. Wragge, who appeared for the applicants with Mr. McKenzie, submitted that exceptional circumstances are present in this matter. These include the following considerations:

1. The series of interconnected events which started with a suspected main engine breakdown on 3 August 2013 and ended on 21 August 2013 with the vessel sinking in deep waters off the coast.
2. The vessel carried a cargo having a considerable CFR value of USD\$6 907 500, 00.
3. The circumstances which gave rise to the engine breakdown, the failed attempt to take up a tow, the running aground, the initial attempts to

⁶ Case No. AC 66/2009, judgment delivered on 26 August 2009.

⁷ Judgment at paras. [11] and [12], Record 239-240

refloat the vessel and its eventual sinking, need to be determined. Since the vessel is now at the bottom of the sea, there is little evidence, other than the eyewitness accounts of the master and crew, which will assist the applicants and the arbitrator in due course to determine what the cause of the sinking was. It is uncertain whether the documentation taken from the vessel which the applicants require to inspect and copy will provide a full explanation of the cause of the engine breakdown and subsequent loss of the vessel.

4. The master and crew all reside in foreign jurisdictions, namely Montenegro, Venezuela, the Ukraine and the Philippines. Neither the respondents nor the master and crew have indicated that any attempt will be made to procure the attendance of the master and crew to give evidence at arbitration in London.
5. The arbitrator in the London proceedings has no power to procure the attendance of foreign witnesses, including the master and crew at the arbitration.
6. The granting of an order in the terms sought will not make any inroad into the practice followed in London arbitration proceedings and the granting of such an order of the nature sought in this matter appears to be consistent with the practice adopted in England.
7. If a commission is convened the parties will require to have sight of the documents removed from the vessel so as properly lead the evidence of the witnesses.
8. The measure of uncertainty caused by the fact that the owner has filed for the commencement of insolvency proceedings in Germany.

[16] I agree with Mr. Wragge's submissions regarding the circumstances but add that it is not required that the circumstances are each on its own exceptional in the sense of being markedly unusual and specially different. The circumstances taken as whole are to be considered. I do not agree with the submission of Mr. Fitzgerald that the exceptional circumstances must relate to the circumstances concerning the evidence the applicants seek to preserve. All the circumstances relevant to the case, including the circumstances giving rise to the claim and the fact that and the reasons why the evidence needs to be preserved, are to be considered. It is the cumulative effect of the relevant circumstances that must in my view, be exceptional. Cleaver, J in The Ioannis NK, at E188H considered that no hard and fast rule can be laid down as to what constitutes exceptional circumstances. Each case must be considered on its merits. In deciding the issue regard must be had to the whole series of events, or factual matrix which led to the application.

[17] In Askania Nova: the insurers and owners of the cargo on a vessel which had taken on water and where a salvage operation was required applied for an order that they be entitled to inspect the vessel and certain documents and to interview the crew. The issue as to what constituted exceptional circumstances arose since the matter was probably to be heard in a foreign jurisdiction. Jones J held that the whole factual complex and the whole series of events which had led to the application in question was sufficient to warrant a conclusion that exceptional circumstances were indeed present. Jones, J stated:

Here we have a vessel carrying a cargo of some fifty million Rands who takes in water in its engine rooms and also in the hulls and salvage operation is

required. This is indeed an exceptional and unusual event which confronted the parties, certainly the owners and the insurers of the cargo and I am satisfied that the whole factual complex indeed does constitute exceptional circumstances.

[18] The documentation that the applicants seek to inspect and copy, and the evidence of the master and crew do exist. The advice given by Mr. Croall QC filed on behalf of the respondents and Mr. Thomas QC filed on behalf of the applicants, is that evidence taken on commission in South Africa will be admissible in the arbitration proceedings. The weight to be attached to such evidence is for the decision of the arbitration tribunal and the weight to be attached to such evidence will no doubt vary depending on whether the master and crew appear or are available to give evidence at the hearing of the arbitration. I accept, as Mr. Croall advised, that if the master and crew should be available to give evidence in person at the arbitration, the evidence taken on commission may have limited weight.

[19] It is pointed out by the respondents that the applicants on their own case need to establish no more than a *prima facie* cargo claim at the arbitration. In order to do so, they will need to prove their *locus standi*, a breach by the carrier of its obligations pursuant to the contract of carriage by showing that the cargo was received by the carrier in good condition and that it was lost. In the circumstances, so it is contended by the respondents, it would not be necessary for the applicants to adduce specific and detailed evidence regarding the cause of the loss of the vessel and the loss of the cargo.

[19] Given the known circumstances and the series of events which ultimately led to the loss of the vessel and the cargo, the documents and the evidence of the master and crew are in my view likely to be vital, if not to constitute a substantiation of the applicants' cause of action, for the determination of any defences that the respondents might raise in the arbitration proceedings. It is therefore likely to be vital for the successful determination of the applicants' claim in the arbitration.

[20] The respondents take issue with the applicants' contention that they have a legitimate concern that, should they not be permitted to inspect the documents in Annexure A to the provisional order or should it not be permitted to take the evidence of the master and crew on commission, the evidence in question will be lost to it.

[21] In regard to the documents in question, the respondents contend that there can be no such apprehension since most if not all of the documents sought by the applicants will be in the possession of the owner and/or its agent and/or managers and since the documents will be made available at the arbitration proceedings. An undertaking to that effect by the owner, its insurer and their solicitors is recorded in the answering papers.

[22] It is not contended by the applicants that the undertaking will not be honoured. They do raise some concern as a result of the fact that liquidation proceedings in respect of the owner has been initiated in Germany and that the liquidators may not be bound by any such undertaking. In my view, even if it be assumed that the documents will be preserved and be available to the applicants at the arbitration in

due course, such availability is not dispositive of the question whether the applicants should be given access to the documents at this stage. As set out hereunder, it is my view that the relief sought regarding the evidence of the master and crew to be taken on commission at this stage, should be granted. This requires that the applicants be given access to the documents in question at this stage to enable them to properly lead the evidence of the master and crew of the vessel on commission. Without the documents being available at the hearing before the commissioner, the evidence of the master and crew may not be of much worth and the whole expensive exercise of convening the commission and hearing what may be unfocused evidence may turn out to be of little ultimate value.

[23] Neither the respondents nor the master and crew have given an undertaking that they will attend at a London arbitration to give evidence. In addition, the respondents raise the important consideration of the invasion of the constitutional rights of the master and crew if they should be further restrained from leaving South Africa and be required to be available to give evidence on commission. The respondents point out that it has already been a number of weeks since the vessel grounded and it is likely that the commission will take some time after the order is handed down. The rights that may be infringed are the right to dignity, the right to privacy, freedom of movement and the right to leave South Africa. In the Tashin Froneman, J accepted that it may be inconvenient or even difficult to get hold of members of the crew to give evidence at any subsequent hearing but held that those considerations must be weighed against the invasion of the crew members' rights to freedom of movement, dignity and privacy. It was not alleged that the crew had committed any crime. There was some vague suggestion that some of the crew may have been negligent in some unspecified manner and that they will consequently be

able to explain the circumstances in which the vessel sank. However, since there was no indication on the papers in that case when their evidence would be heard, who would hear the evidence, in what manner it would be heard and how long the process would take, the learned judge was of the view that the invasion of the crew members' rights for the convenience of litigation, was not justified and that the crew should not be restrained from going home to their families and friends as soon as possible to recover from what must have been a rather frightening experience at sea. The facts of the Tashin are however, clearly distinguishable from the present case. Here it is known that the commission will start soon and will, unless extended by the commissioner, not endure for more than a week. The master and crew have not come to oppose the relief sought. It may perhaps also be said that the life of a seaman is not only fraught with the dangers of a life at sea but also a life that may foreseeably include being tied up in litigation and being interdicted to be available to give evidence on commission in a foreign country.

[24] In the Boundary, Bozalek J was called upon to deal with an application in terms of s 5(5) in a case where the litigation would take place in the Republic. Exceptional circumstances were therefore not required to be established. The master and crew had given an undertaking to be available to appear at the hearing to give evidence. On the issue whether there should be a commission taking the evidence of the crew, Bozalek J held as follows at Para [20]

'It was not seriously contended by the first respondent that the evidence which the applicant sought to have taken by the commissioner would not be material to any maritime claims which might be advanced against the applicant or be

brought by the applicant in the South African Courts. In my view the applicant has thus established that it was necessary or desirable for the purposes of dealing with the maritime claims which may be instituted in the fullness of time, for the evidence of the crew to be taken upon commission.⁷

As to whether it is appropriate to have the crew give evidence on commission at an early stage Bozalek, J said the following,

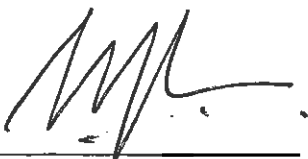
“All the crew members are presently in Cape Town and are from far flung parts of the world. Should their evidence not be taken it might be years before the matter comes to trial, by which stage they might long since have left the employ of the first applicant or its sister companies and have dispersed all over the world. It is correct that each crew member has undertaken to make himself available to testify in these proceedings if called upon to do so, subject to the provision that they are provided with reasonable notice of the date of such proceedings and that any expenses incurred are paid by the applicant. However, it needs little imagination to see the potential problems if their evidence is not taken at this stage. First, they will have to be found; secondly, the date of the proceedings may not suit one or more of them, for example, they might be engaged at the time in the midst of a lengthy voyage and be contractually committed to a different employer. ... It is important, furthermore, that every crew member now has a fresh recollection of the incident. From that perspective taking their evidence early will ensure that it has much greater value.”⁸

⁸ Per Bozalek J in Ocean Africa Container Lines (Pty) Limited v MS Maria Rickmers gmbh unreported decision under case no. AC 167/2010 during November 2010

[26] In my view, the cumulative effect of the circumstances discussed above, taken together, constitute the exceptional circumstances contemplated in s 5(5)(a)(iv) of the Admiralty Act. In addition, it is in my view, necessary and also desirable for the purpose of determining the matters that will arise in the arbitration proceedings in London that the documents in question be examined at this stage and that the evidence of the master and crew of the vessel be taken on commission.

[27] In view of the urgency of the matter, I adopted the procedure that was followed in The Boundary where the parties were called upon to agree to the terms of a draft order. I did so after coming to a firm and final conclusion that an order should be made in the terms sought by the applicants. I called upon the parties on Tuesday 27 August 2013 to prepare such an order in advance of giving my reasons. On Wednesday 28 August 2013 I made such an order with reasons to follow.

[28] For the reasons set out in this judgment the rule *nisi* set out in paragraph 2 of the order made by Davis, AJ on 13 August 2013 is confirmed to the extent and on the terms set out in the order made on 28 August 2013.

A handwritten signature in black ink, appearing to be 'W.J. Louw', written over a horizontal line.

W.J. LOUW
Judge of the High Court