IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)
(Exercising its Admiralty Jurisdiction)

Case No: **AC 2/16, AC 61/15, AC 62/15 and AC 63/15**

NAME OF SHIP: **MV '*KENANGA*'**

In the matter between:

STX MARINE SERVICE CO. LTD	Applicant
and	
MV "*KENANGA*"	First Respondent
MERANTI MARITIME PT	Second Respondent
PT. BANK MAYBANK INDONESIA, TBK	Intervening Party

Court:	Van Staden, AJ
Date of Hearing:	31 March 2016
Date of Order:	1 April 2016
Reasons for Order:	11 May 2016

JUDGMENT

INTRODUCTION

1. The applicant, STX Marine Service Co. Ltd ('STX') brought an application in terms of section 9 of the Admiralty Jurisdiction Regulation Act, 105 of 1983, as amended ('the Admiralty Act') and obtained a provisional order on 26 January 2016 for

the sale of the vessel ('Kenanga') of the first respondent, Meranti Marine Pt ('Meranti'). The return day of the provisional order was 24 February 2016 and proper service of this provisional order was effected.

2. On the eve of the return day the intervening party PT. Bank Maybank Indonesia, TBK ('Maybank') launched an application for leave to intervene and for an order staying the sale of the vessel pending the outcome of suspension of payment of debt proceedings currently before the Commercial Court in the Central Jakarta District in Jakarta, Indonesia. Maybank seeks an order that:

2.1. The decree of the Central Jakarta Commercial Court granted on 25 November 2015 ('The PKPU decree') be recognised by this Court and given full force and effect;

2.2. STX's application for the sale of the Kenanga be dismissed, alternatively stayed until finalisation of the PNKPU proceedings presently before the Jakarta Court; and

2.3. STX pay the costs of the application.

3. The matter was heard on 31 March 2016 and on 1 April 2016 an order in the following terms was made:

3.1. The intervening party is granted leave to intervene in the application to sell the vessel MV 'Kenanga' launched by the applicant under case number AC2/16.

3.2. The intervening party's application for the relief set out in Part B of its notice of motion dated 1st March 2016, is dismissed with costs.

3.3. The rule nisi granted on 26 January 2016 is made final.

3.4. Reasons for this order will be furnished at the request of any of the parties as provided for in Rule 49(1) (c) of the Uniform Rules of Court.

4. Thereafter on 6 April 2016 Maybank requested reasons and these reasons are furnished herewith.

BACKGROUND FACTS

5. ('STX') is a company incorporated in South Korea and carries on business as a ships' manager.

6. On 16 July 2013 STX concluded a ship management agreement with Meranti in terms of which STX was appointed as technical and crew manager for Kenanga and the vessels mv 'Agatis' and the mv 'Mahoni'. Meranti is the registered owner of the Kenanga.

7. STX duly rendered technical and crew management services to the vessels. During the course of the contract representatives of STX and Meranti signed addenda to the ship management agreement recording Meranti's indebtedness to STX. As at 29 December 2009 the parties agreed that Meranti was indebted to STX in amounts of US$1,082,020.27 in respect of the Kenanga, US$277,786.58 in respect of the 'Agatis' and US$847,179.80 in respect of the 'Mahoni'.

8. The PKPU decree with the effect of suspending the payment of debts by Meranti as owner of the Kenanga, pending the acceptance by the Indonesian court of a scheme of arrangement or settlement plan, was granted on 25 November 2015.

9. Meranti refused to pay the amounts referred to in paragraph 7 above, and, as a consequence, on 29 December 2015 STX caused two writs of summons *in rem* to be issued, one for payment of Meranti's indebtedness relating to the Kenanga, and the other for payment of Meranti's indebtedness in respect of the 'Agatis' and the 'Mahoni'. The actions were duly instituted by the arrest of the Kenanga and the service of the two writs of summons *in rem* on the vessel.

10. No appearance to defend has been entered in either of the actions *in rem* and the *dies induciae* have long since expired.

11. At the time of the arrest of the Kenanga there were twenty officers and crew on board the vessel. On 28 December 2015, prior to the arrest of the vessel, the master sent an email to STX requesting that STX arrange for the repatriation of the crew or that, at least, it supply provisions and fuel for the vessel. It was apparent that Meranti had abandoned the vessel.

12. The master and crew have issued caveats against the release of the Kenanga from arrest in terms of Admiralty Rule 4(4) of the rules governing the conduct of admiralty proceedings before this court ('the Admiralty Rules'). The claims described in the caveats have substantially been reduced due to the fact that STX paid the crew wages, on the understanding that it will be able to recover the amounts paid by it as

wages from the fund comprising the proceeds of the sale of the vessel as a claim that qualifies to be ranked for payment in terms of section 11 of the Admiralty Act.

13. STX has paid for the repatriation of ten crew members and ten remain behind due to the insistence of the South African Maritime Safety Authority that a minimum crew compliment be kept on board the vessel for safety reasons.

14. The wages of the crew who are obliged to remain on board of Kenanga while she remains under arrest, including port dues, water, electricity and the Sheriff's fee already amount to over R1,7 million and continue to accrue at the rate of approximately R16 000 per day.

15. There are other claimants, who are not incorporated or alleged to be resident in Indonesia, with claims against the Kenanga and who have lodged caveats:

15.1. Hanseatic Bunker Services GmbH, a company incorporated in Germany;

15.2. Beacon Offshore Ltd, a company incorporated in Thailand; and

15.3. Oceanic Ship Management FZE, a company incorporated in the United Arab Emirates.

16. On 26 January 2016 STX obtained the provisional order referred to in paragraph 1 above calling on interested parties to show cause why the Kenanga should not be sold by public auction, why a fund should not be created comprising the proceeds of the sale, why a referee should not be appointed to consider and make recommendations in

relation to the validity and ranking of claims lodged for payment out of the fund and why that fund should not be distributed in accordance with an order made by this court.

17. The return date of the provisional order was stipulated as being 24 February 2016. The lengthy period was provided for so as to ensure that all interested parties became aware of the order.

18. The provisional order was properly served and Maybank became aware of this order, at the latest, by 1 February 2016. Due to understandable difficulties in obtaining proper instructions, Maybank launched its intervention application shortly before the return day.

THE INTERVENTION APPLICATION

19. STX does not oppose Maybank's intervention in the sale application. Maybank, as mortgagee of the Kenanga clearly has a real and substantial interest in the sale of the vessel. It does, however, oppose the relief sought by the bank.

DISPUTES BETWEEN THE PARTIES

20. Mr Gordon, counsel for the intervening party, identified the disputes between the parties as -

> 20.1. Whether or not the PKPU decree should be recognised and enforced by this court;
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> 20.2. If so, whether section 10 of the Admiralty Act operates so as to prevent the enforcement of the order so recognised; and

20.3. Whether the court should exercise its discretion in favour of the sale of Kenanga or in favour of a stay of the sale.

THE RECOGNITION OF THE PKPU DECREE

21. Maybank contends that the PKPU decree has the effect of suspending the payment of debts by Meranti pending the acceptance by the Jakarta court of a scheme of arrangement or a settlement plan.

22. STX opposes the granting of the relief sought by Maybank on the grounds that the PKPU decree does not satisfy the South African common and private international law requirements for the recognition and enforcement of a foreign judgment. STX also avers that the decree issued by the Jakarta court does not have extra-territorial effect and has no effect on the granting of an order for the sale of the Kenanga.

23. It is common cause between the parties that the requirements in our law for the recognition and enforcement of a foreign judgment, that are also relevant in the matter under consideration, are the following:

a) The foreign court must have international jurisdiction or competence;

b) The judgment is final and conclusive in its effect;

c) The recognition and enforcement of the judgment must not be contrary to public policy.[1]

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[1] *Jones v Krok* 1995 (1) SA 677 (A) at 685B-D; Forsyth *Private International Law* (5ed) at 419; *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) at para 38 page 337C – 338B.

24. I agree with the following general submissions of applicant's counsel:

24.1. The effect of the PKPU decree is that the administrators and Meranti co-managed the company in question during the period of the PKPU proceedings. The administrator's do not assume control of the company's assets. There is therefore no 'vesting' of the company's assets in the administrator as would occur in a South African insolvency[2].

24.2. The provisions of article 242(1) of Law number 37 of 2004 regarding Bankruptcy and Suspension of Debt Payment Obligations, being the law pursuant to which the PKPU decree was granted, and which provides for a suspension of Meranti's obligation to pay its debt during the period of suspension, only have application in the area over which the Indonesian Court has jurisdiction, which is within Indonesia.

24.3. Although the PKPU decree is not, strictly speaking, a judgement 'sounding in money', its effect is to place a restraint on creditors who may wish to enforce their claims against Meranti in Indonesia. The principles that apply to the recognition and enforcement of a foreign order of the type of the PKPU decree should be the same as those that are applied to a foreign judgment sounding in money.

24.4. It is not in dispute that in the event of this court not recognising and giving effect to the PKPU decree, the sale of the Kenanga may proceed and the

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[2] *Soane v Lyle NO* 1980 (3) SA183 (D) at 186 C – D.

provisional order should be made final. This is because the PKPU decree, in the absence of recognition, does not have extra-territorial effect.[3]

24.5. If the sale application is dismissed, the Kenanga will remain under arrest and the actions *in rem* instituted by STX will continue. The bank does not appear to seek an order dismissing or staying the actions *in rem*.

24.6. If the sale application is stayed, the Kenanga will remain under arrest until the finalisation of the PKPU proceedings. These proceedings have been postponed on a number of occasions (20 January 2016, 18 February 2016 and 24 March 2016) and could continue until the middle of August 2016.

JURISDICTION

25. In respect of the requirement of international jurisdiction of a foreign court the parties are at idem that the principles recognised by South African law in respect of the enforcement of a judgment sounding in money are:

25.1. At the time of the commencement of the proceedings the defendant must have been domiciled or resident within the State in which the foreign court exercised jurisdiction; or

25.2. The defendant must have submitted to the jurisdiction of the foreign court.[4]

26. The intervening party's counsel agreed that STX is neither resident nor domiciled within the jurisdiction of the Jakarta Court and that STX was not present within the

[3] *Ward v Smit: In re Gurr v Zambia Airways Corp Ltd* 1998(3) SA 175(A) at 179E in this respect.
[4] *Purser v Sales* 2001 (3) SA 445 (SCA) para [12] at page 450J- 451B; *Government of the Republic of Zimbabwe v Fick* (supra) at para [38].

jurisdiction of that court at the time of the granting of the PKPU decree. He, however, submitted that the conduct of STX in submitting itself to the PKPU proceedings, in taking an active part in the creditors meetings in accordance with the PKPU process and in submitting a claim to the Administrators as provided for and in terms of the PKPU process, evidences a clear submission to the jurisdiction of the Jakarta Court and the PKPU process. The Jakarta Court therefore had and continues to have international jurisdiction and competence in relation to the PKPU decree.

27. The facts of the matter under consideration can be distinguished from the facts in *Purser v Sales (supra)*. In that matter summons was issued and judgment by default granted. Under these circumstances the court held that the appellant had submitted to the jurisdiction of the English Court. In the matter under consideration, which is in the nature of business rescue proceedings, there is no question of *litis contestatio*.[5]

28. In my view, STX therefore did not submit to the jurisdiction of the Indonesian Court by partaking in a process akin to business rescue proceedings in Indonesia. I believe that STX, in order its own interest, had no other option but to partake in such proceedings.

29. Maybank has therefore not convinced me that the Indonesian court has international jurisdiction over STX and the other foreign creditors seeking to prove claims for payment out of the fund comprising the proceeds of the sale of the Kenanga should the sale take place.

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[5] *Purser v Sales* para 16 – 18 at page 451I – 452E.

FINALITY

30. In respect of finality it is not in dispute that a foreign judgment that is sought to be recognised and enforced, must be final and conclusive before it is recognised and enforced. In *Jones v Krok*[6] it was pointed out that it is undesirable that a foreign judgment, which may be set aside or altered by the court that made it in the first place, should be recognised and enforced.

31. Counsel for the intervening party submitted that the PKPU decree is final and conclusive for the following reasons:

31.1. The effect of the PKPU decree, together with several further decrees made by the Jakarta Court extending the PKPU process, has the effect that all the payments and debts are and remains suspended.

31.2. For as long as the PKPU process is ongoing, these orders have final effect in relation to the prosecutions of claims against Meranti.

31.3. The orders are not subject to appeal, nor are they akin to default judgments which are open to consideration or alteration by the Jakarta court.[7]

31.4. Only the period of its continuation of the PKPU decree is subject to consideration from time to time by the Jakarta court.

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[6] (*supra*) at 689G-691A; C Forsyth; op.cit. at 457.
[7] Reference was made to the discussion on finality in Forsyth *Private International Law* 5th Edition at page 457 – 460.

31.5. The effect of the PKPU decree, being the stay of enforcement proceedings, is not open to reconsideration or alteration.[8]

32. I, however, agree with applicant's counsel that it is evident from the PKPU decree that the Jakarta court had only granted a temporary suspension of debt repayment obligations and that this temporary suspension is only to continue until the hearing referred to in Article 226(1) of the Indonesian Bankruptcy Law takes place. The PKPU decree is subject to alteration by the Jakarta court and operates for a limited period and it has therefore not been shown that the PKPU decree is final and conclusive in effect.

33. I furthermore agree that the Jakarta court merely granted a temporary suspension of debt repayment obligations. This temporary suspension is only to continue until the hearing referred to in Article 226(1) of the Indonesian Bankruptcy Law takes place.[9] This meeting has been postponed from time to time (the last postponement being until 24 March 2016) and there is no evidence to suggest that this meeting has not been postponed again. The deponent, Mr Krismawan, an Indonesian advocate, has confirmed that the PKPU decree is subject to alteration by the Jakarta Court and only operates for a limited period.

34. I am therefore also not satisfied that Maybank has shown that the PKPU decree is final and conclusive in effect.

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[8] Reference was made to article 235(1) of the Indonesian Code/264

[9] Article 227 of the Indonesian Bankruptcy Law; Annexure "CRH2".

PUBLIC POLICY

35. In respect of the requirement that the recognition and enforcement of the judgment must not be contrary to public policy, I agree with the following submissions of applicant's counsel.

35.1. The PKPU decree was granted *ex parte* without STX or other creditors having notice of the petition. It would appear that the decree is, in effect, a type of rule nisi, which provides for creditors and interested parties to attend before the Jakarta Court on a later date, equivalent to the return day of the rule nisi, at which hearing a final order of suspension may or may not be granted.[10]

35.2. The judgment was therefore rendered contrary to the rule of natural justice in that STX had no notice of the proceedings and no opportunity to present its case.[11]

35.3. The recognition of the PKPU decree would be contrary to the objective that the legislature clearly intended to achieve by section 10 of the Admiralty Act.

35.4. The purpose of section 10 of the Admiralty Act is to ensure that, once property has been arrested in respect of a maritime claim, the arrested property and the proceeds of the sale thereof are reserved for maritime creditors who are entitled to prove a claim for payment out of the fund

[10] Article 228 of the Bankruptcy Law.
[11] *Lissack v Duarte* 1974(4) SA 560 (N) at 565A- D; *Jones v Krok* 1996(1) SA 504 (T) at 511E; C Forsyth; op. cit. at 461.

comprising the proceeds of the sale of the arrested property which falls to be ranked for payment according to the scheme of priorities set out in section 11 of the Admiralty Act.[12]

35.5. Section 10 provides expressly that no proceedings in respect of the arrested property shall be stayed by or by reason of any judicial management with respect to that owner.

35.6. The meaning to be given to the phrase 'judicial management' cannot be confined to construing it as a reference only to the judicial management provisions in chapter XV the South African Companies Act, 1973. Properly construed, 'judicial management' must refer to a procedure whereunder the affairs of the company are placed under judicial oversight so to give the company an opportunity to surmount its financial difficulties and become profitable once again, including business rescue proceedings such as those described in the Suspension of Obligation for Payment of Debt provisions in chapter III of the Indonesian Bankruptcy Law and the business rescue provisions in Chapter 6 of the South African Companies Act, 2008.[13]

35.7. Public policy dictates that a foreign order or decree should not be recognised where its effect is to deprive creditors who have legitimately commenced proceedings to recover a debt of their right to proceed to execution. This is particularly the case where to permit the recognition and

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[12] G. Hofmeyr *Admiralty Jurisdiction, Law and Practice in South Africa* 2nd ed. (2012) at 78.
[13] Hofmeyr op cit at p 78.

enforcement of such an order would be contrary to the terms and spirit of section 10 of the Admiralty Act.

36. In respect of public policy the intervening party's counsel made the following submissions:

36.1. Section 10 of the Admiralty Act does not refer to a business rescue practitioner or business rescue proceedings and that business rescue proceedings should not be read into section 10.[14] On a proper construction of section 10 it is not necessary to read the words 'business rescue' into this section 10 so as to avoid an absurdity in the legislation or to make the section workable. The author Hofmeyr erred in his suggestion that a practitioner in business rescue proceedings falls within the purview of section 10. In respect of the interpretation of section 10, the intervening creditor's counsel also relied on the fact that section 10 was not amended by the new Companies Act, 71 of 2008.

36.2. The fact that STX were unable to be heard before the PKPU decree was issued and the argument that this is contrary to public policy, ignores the fact that all the creditors of Meranti who have chosen to participate in the PKPU proceedings, including STX, are constantly given a procedural voice during the currency of the PKPU process. They are able to exercise the procedural right to attend meetings of creditors, to vote on resolution

[14] Counsel for Maybank referred to *Cool Ideas 1186 CC v Hubbard & Another* 2014 (4) SA 474 (CC) at para 28 and *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18.

and STX has periodically and consistently participate in the decision-making process.

36.3. It is in the public interest that foreign business rescue proceedings should be recognised by our courts.[15]

37. I am also not persuaded by these submissions of the intervening party's counsel. I agree with the disputed viewpoint of the author, Hofmeyr, and the submission of applicant's counsel to the effect that the recognition of the PKPU decree would not be in the public interest.

THE COURT'S DISCRETION TO ORDER THE SALE OF THE KENANGA

38. It is not in dispute that the court has a wide and unfettered discretion to order the sale of the Kenanga[16]. Intervening party's counsel submitted that in the event of the PKPU decree not being recognised the court should exercise the discretion not to order the sale of the Kenanga for a number of reasons. Having considered all these reasons I concluded that such a discretion should not be exercised in favour of Maybank.

CONCLUSION

39. The intervening party has therefore not persuaded me that this court has inherent jurisdiction to recognise and enforce the PKPU decree, that the PKPU decree is final in effect, or that the recognition of the PKPU decree would not be contrary to public policy.

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[15] *Koen and another v Wedgewood Village Golf & Country Estate (Pty) Ltd and others* 2012(2) SA 378 (WCC) at para 14.
[16] G Hofmeyr op cit at 282.

40. In all the circumstances the order referred in paragraph 5 above was made on 1 March 2016.

W.H. VAN STADEN

Acting Judge of the High Court