

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

THE REPUBLIC OF SOUTH AFRICA

Case No: A91/2011

In the matter between:

**SIBI SHIPPING (PRIVATE) LIMITED**

**First Applicant**

**MV "SIBI"**

**Second Applicant**

and

**SOCITÉ DE DISTRUBUTION DE TOUTES**

**MERCHANDISES EN COTÈ D'IVOIRE**

**Respondent**

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**JUDGMENT**

**Delivered: 06 December 2013**

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**MBATHA, J**

1.

The First Applicant is **SIBI SHIPPING (PRIVATE) LIMITED**, a company duly incorporated in accordance with the laws of Pakistan and carrying on business as a ship owner at 14<sup>th</sup> Floor, PNSC Building, MT Kahn Road, Karachi, Pakistan.

2.

The Second Applicant is the motor vessel "**SIBI**", a hand size bulk carrier of 28, 442 mt dwt, having IMO number 9519224 and flying the Pakistan flag. The **SIBI** is owned by **SIBI SHIPPING**.

3.

The Respondent is **SOCIÉTÈ DE DISTRIBUTION DE TOUTES MERCHANDISE EN COTÈ D'IVOIRE**, a company described in the summons *in rem* as being incorporated in terms of the law of Cotè d'Ivoire and having offices at Abidjan, Cotè d'Ivoire.

4.

The Applicants seek an order from this Court to set aside the deemed arrest of the "SIBI" at the instance of the Respondent. The deemed arrest was effected on 24 December 2012. This was subsequently followed by the institution of an action *in rem* against the vessel. It also seeks an order that the Court decline to exercise its jurisdiction in terms of section 7(1) of the Admiralty Jurisdiction Regulation Act No.105 of 1982.

5.

The Application is opposed by the Respondent. Furthermore, the Respondent has advanced that this application should be dismissed with costs on the basis that there are material disputes of fact. Respondent submits that the following material disputes of fact exist:

- (a) Whether the bill of lading of which the Respondent becomes a holder contained a London arbitration clause;

- (b) Whether the bill of lading put up by the Applicants' is the authentic one, in particular the reverse part thereof; and
- (c) Whether the Respondent was aware at the time when the writ of summons was issued and at the time when it applied for an extension of that writ of the Applicants' allegation that the original bill of lading was different from the copy in the Respondents' possession and that the original bill contained a London arbitration clause.

## 6.

A background to the application is as follows:

- 6.1 A claim arose as a result of damage to a cargo of rice and non-delivery of 14, 237 bags of rice carried on the ship, also known as the "SIBI" belonging to the First Applicant. The shipment of the cargo was from Port Qasim, Pakistan to Abidjan, Ivory Coast.
- 6.2 There were allegations of damage to a huge consignment of rice, in that they were torn, leaking, mouldy and there was a short landing of a number of bags. The cargo was shipped by Locus Dreyfus Commodities Suisse SA under the bill of lading number 00151B10408 issued on the 25<sup>th</sup> of April 2008 by the owner's agents, Pakistan National Shipping Corporation.
- 6.3 A claim was lodged on behalf of the Respondent. It was handed over to Steamship Insurance, the insurers of the "SIBI". The "SIBI" was

subsequently decommissioned on or about March 2009. This was an associated ship to the Second Applicant.

- 6.4 The Respondent became the holder of the bill of lading, which it surrendered to the First Applicant's agent in order to obtain delivery of the cargo.
- 6.5 It appears that all the parties recognised that the contract of carriage incorporated the Hague Rules. The main claim was subject to a one year time bar, on behalf of SIBI Shipping and Pakistan National Shipping Corporation. This led to applications of extensions of time from time to time by the Respondent. National Shipping Corporation Steamship Insurance granted same. After the Respondent obtained the last extension of time on the 4<sup>th</sup> of September 2012, and pursuant to an ex parte application before the Judge of this Court, the Respondent obtained a month order extending the twelve (12) month period.
- 6.6 Having obtained such an extension, on the 7<sup>th</sup> of September 2011 the Respondent issued a writ of summons *in rem* out of this Court. The associate ship, the Second Applicant, was then arrested by the Respondent; and the writ of summons was served, thereby instituting the action *in rem* against the Second Applicant.

6.7 A non-negotiable bill of lading was produced by those representing the Respondent. Steamship Insurance, representing the Applicants denied that they were liable for damages or loss to the cargo by reason of clause 21 of the charterparty. The clause states that the shippers or receivers were to load, discharge and tally the cargo at their own risk. The carrier will not be held liable for any shortage or damage to the cargo done by stevedores or receivers at discharge ports. Respondent denied that they were entitled to rely on that clause.

## 7.

7.1 Having heard submissions from both counsel, I noted that the Applicants have made reference to a clause 54 of a charterparty clause which states that any dispute under this charter is to be referred to arbitration in London according to English Law. This is the first dispute of fact between the parties.

7.2 The applicants are also in possession of a bill of lading. It is a negotiable bill of lading, different from the one submitted on behalf of the Respondent in their claim of damages. It states as follows

*"All terms and conditions liberties and exceptions of the Charterparty dated as over lead, including the Law and Arbitration clause, are herewith incorporated".*

- 7.3 In contrast, the Respondents' summons *in rem* attaches the non-negotiable bill of lading *in rem*. This would mean that the arbitration clause is excluded in the contract of carriage. This also creates a dispute of facts between the parties.
- 7.4 The Applicants contend that the Judge would not have granted the ex parte application on the 4<sup>th</sup> of September 2012, had the correct bill of lading been attached, i.e. the one with they contend is the correct bill of lading. The Respondent states that they attached a correct bill of lading. Further, the Applicants submit that the Respondent had failed to disclose to the Court that their claim was strongly defended by the Applicants on the basis that the shortage or damage could have arisen at the time when the cargo was loaded or discharged or as a result of an incorrect tally. This had been communicated in writing to the Respondent but no response was forthcoming. All these issues create a dispute of facts.

## 8.

- 8.1 Counsel for the Applicants' submits that the dispute of facts have played a role but not an overwhelming role to be a bar to hearing the argument on the merits and argued the case on the merits. The Respondent's submission is that there are disputes of facts which cannot be resolved on the papers, but agreed that it is intricately wound up in the argument as a whole.

- 8.2 I have applied my mind to the facts before me to determine whether there is a dispute of facts or not which need to be referred to oral evidence before, I can make any findings on the merits of the application.
- 8.3 A claim was submitted to the ship's insurers, together with a bill of lading, marked "copy non-negotiable". The Applicants submits that the Respondent failed to produce the original. I was referred to page 38 of the indexed pages, where a bill of lading appears endorsed with the words "*the first original*". It is also a copy, signed by Pakistan National Shipping Corporation as "*Agent only for and on behalf of the Master of the vessel*".
- 8.4 This bill of lading upon which the Applicants rely upon at clause 39 provides as follows:

*"All terms and conditions, liberties and exceptions of the charterparty dated as overleaf, including the law and Arbitration Clause, are herewith incorporated."*

It was further submitted that the charterparty incorporates the arbitration clause. However, the non-negotiable bill of lading submitted by the Respondent does not have a reference to an incorporation of the arbitration clause. This, I find, to be a genuine dispute of fact, which cannot be resolved without resorting to oral evidence.

8.5 This is important in the light whether the arrest of the Motor Vessels "SIBI" was lawful or not. This cannot be decided without deciding which bill of lading is the correct one.

9.

The issue of whether a case has been made by the Applicants cannot be decided at this stage, in the light of the aforementioned disputes of facts.

10.

I was referred to a number of authorities by counsel for the Applicants in the approach that I need to adopt as well as on the merits of the application. I cannot decide which bill of lading is the applicable one. There is a clear dispute of fact on the papers as to whether the contract of carriage is the one evidenced by the bill of lading submitted by the Respondents or the Applicants. There is also the issue of the authenticity of the bills of ladings before the Court, as copies only have been attached to the papers before me. The other disputes of facts will be resolved only upon the determination of which bill of lading is the correct one.

11.

The general rule as laid out in **Plascon-Evans Paints LTD v Van Riebeeck Paints (PTY) LTD**<sup>1</sup> state that where there is a dispute as to facts, relief should be

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<sup>1</sup> 1984 (3) SA 623 (A)



granted in motion proceedings only if the facts stated by the Respondent together with admitted facts in the Applicants affidavits justify the order.

12.

I have tried to see if I can also adopt the robust approach as advocated by Shongwe JA in **Buffalo Freight Systems (PTY) LTD v Crestleigh Trading (PTY) LTD and Another**<sup>2</sup> and found that it cannot be adopted in this matter. The submissions made by the Respondents in this regard support the view that indeed there is a dispute of fact on the papers. There are two (2) versions of the bill of lading before the Court, none of which is the original. The Applicant's bill contains an arbitration clause and the Respondents' does not.

13.

I therefore find that there is a genuine dispute of facts which cannot be determined on the papers.

14.

I therefore make the following order:

- (a) The Application for an order as prayed for by the Applicants is dismissed with costs.

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<sup>2</sup> 2011 (1) SA 8 (SCA)

- (b) The application is referred to oral evidence in terms of Rule 6(5) (g) of the Rules of this Court for the determination of which bill of lading is the applicable one to the proceedings.

*J Mbatha*

**MBATHA, J**

Date of hearing: 03 September 2013

Date of Judgment: 06 December 2013

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