Republic of South Africa

In the High Court of South Africa
Western Cape High Court, Cape Town

REPORTABLE

CASE NO: AC 104/09 and **AC 03/10**

TRANSNET LIMITED Applicant

and

MV "ALINA II" Respondent

JUDGMENT: 5 SEPTEMBER 2013

GOLIATH, J

1. This is an interlocutory application for the discovery of certain documents in terms of Uniform Rules of Court 35(7). The applicant seeks an order compelling the respondent to comply with a notice in terms of Rule 35 (3). The respondent opposes the application.

2. The applicant is the Port authority at Saldanha Bay that instituted two actions in this court against the respondent. The applicant since identified itself as Transnet Limited and its two actions have been consolidated. The respondent is the MV "Alina II" (the vessel). On 29 October 2009 the vessel berthed at the Langebaan Iron Terminal at the port. On completion of the loading on 31 October 2009, the vessel

took on a port list and it was discovered that the vessel's hull had pre-existing damage and that there had been ingress of water into the double-bottom port ballast tank caused by the fracture of the vessel's hull. As a result the damaged vessel remained at the terminal until 26 March 2010. The vessel's extended occupation of the terminal resulted in there only being a single berth available to load other vessels during this period. Consequently the applicant is claiming significant damages from respondent arising out of this incident. In addition to this, substantial damages were sustained, not only by the applicant, but also by the owner of the cargo which had been loaded on board the vessel at Saldanha, Anyang Steel International Trading Co Ltd ("Anyang"), and various companies in the Kumba Iron Ore Group of companies which had chartered the vessel from her owner.

3. In the event that the respondent is found liable to the applicant, the respondent has indicated that it intends to seek a stay in the proceedings on the basis that:

3.1 A number of legal proceedings have been brought or threatened to be brought in arbitration proceedings in London against it in relation to the same incident, in the capital sum of US $ 15,932, 272 45.

3.2 It and the vessel's owners are entitled to bring proceedings for an order limiting their total liability for that incident in terms of Section 261(1)(b) of the Merchant Shipping Act, 57 of 1951(MSA).

4. Anyang has instituted arbitration proceedings against the vessel's owners in London and Kumba Shipping Hong Kong Limited ("Kumba HK") has commenced arbitration proceedings against the owner in London. Applicant is seeking disclosure

of these arbitration documents in respondent's possession for the purposes of inspection in terms of Uniform Rule 35(3). In its notice in terms of Rule 35(3) the applicant seeks inspection of three categories of documents:-

4.1 The pleadings and all other documents filed of record and/or exchanged between the parties in, or in relation to, the proceedings instituted by way of arbitration or court process against the respondent, the owner and/or those who have an interest in her, by or at the instance of:

4.1.1 the person(s) responsible for the interdict referred to in paragraph 8 of defendant's plea; and/or

4.1.2 Anyang; and/or

4.1.3 any other persons, apart from those referred to in the preceding two sub-paragraphs;

4.2 Documents discovered and/or made available by the parties to each other in the aforesaid proceedings ("the discovered documents"); and

4.3 All documents in which claims against the respondent or the owner have been intimated or demanded arising out of the incident referred to in paragraph 25 of the defendant's plea, apart from claims by those persons already listed in paragraphs 25.1 to 25.3 of the plea ("the claim documents").

5. Applicant contends that two aspects of the pleadings filed in both matters are particularly relevant to the application:

5.1 firstly, the defence pleaded by the defendant that the vessel did not depart from the berth as a result of her condition, but by virtue of an interdict brought by Anyang under case number AC 107/2009 to interdict various parties from removing the vessel from her berth; and

5.2 second, the defendant's reliance on limitation of liability in terms of Section 261(1) (b) of the Merchant Shipping Act 57 of 1951.

6. Applicant highlighted paragraph 8 of Plaintiff's amended particulars of claim where plaintiff pleads that the damage to the vessel :

> *"detracted from the vessel's seaworthiness and/or rendered her unseaworthy. As a result of the damage and the fracture (of her hull), she was prohibited from departing, alternatively was unable to depart, from the terminal."*

In response, in paragraph 8 of the defendant's amended plea the defendant raised as an express defence the fact that:

> *"... the vessel was prohibited from departing from its berth at the terminal not as a result of any condition of the vessel or any act or omission of those responsible for the vessel but by virtue of an interdict granted by the above Honourable Court on 18 December 2009 which was thereafter periodically extended and which was at all times opposed by the owners of the defendant."*

7. The applicant disputes this defence and replicates that:

7.1 The Anyang interdict application was launched as a result of the vessel's condition at that time.

7.2 The interdict was necessitated by virtue of the condition of the vessel when she entered the port.

7.3 At the relevant time it was reasonably foreseeable that the vessel's entry into the port in such defective condition could give rise to legal proceedings such as the Anyang interdict application, which may have resulted in the detention of the vessel.

8. Applicant therefore submits that the nature of Anyang's cause of action against the vessel's owner which gave rise to the Anyang application is directly relevant to the defendant's defence to plaintiff's claim. This cause of action forms the subject matter of the Anyang arbitration, hence documents filed in the Anyang arbitration are directly relevant to this action.

9. Respondent contends that applicant had identified those aspects which it considered relevant in the Anyang arbitration, namely, the amount claimed by Anyang, and the nature of the claim, including any allegations regarding the interdict. Respondent has provided the applicant with all this information. Applicant is therefore aware that the amount of Anyang's claim is US $11,234,054,57 and £ 5,892,50, the nature of the claim is based on Anyang being the holder of a bill of lading, and the pleadings contained no more "*allegations regarding the interdict*", than are already in the respondent's plea. Respondent therefore argues that there is

no need to order the production of pleadings in the Anyang arbitration, since they are irrelevant. Any further information regarding the arbitration will not assist the applicant in establishing the main issues in dispute, namely, (a) its disputed contract with the vessel's owner, or (b) the disputed legal duties owed to it by the owner and/or crew, or (c) any alleged breaches of contract or duties by the owner and/or crew, or (d) whether the vessel was detained at Saldanha Bay because of her unseaworthy condition or the interdict, or (e) its damages.

10. Respondent further contends that applicant's statement that "*Anyang's cause of action [in the arbitration proceedings] against the vessel owner which gave rise to the Anyang interdict application is directly relevant to the defendant's defence to the plaintiff's claim*" is logically and legally untenable. It is argued that the effect of the vessel's stay at Saldanha must be determined on the basis of pre-existing facts. It cannot be determined by allegations in a subsequently instituted arbitration, even if by the same party and even if based on the same or similar allegations. Furthermore, what is relevant for causation is the basis on which the interdict was brought, the interdict's effect, and whether any factors prevailing at the time were causally connected to the vessel's stay at Saldanha. These facts are then to be considered on the basis of a "*sensible retrospective analysis.*" Consequently, respondent submits that Anyang's plea in the arbitration will not assist in an enquiry as to what caused the vessel's extended stay at the iron ore terminal. Issues raised in applicant's replication should also be considered on the basis of a "*sensible retrospective analysis*" in determining whether respondent's denial of causation is to be upheld, and nothing after the release of the vessel from the interdict is relevant in that inquiry. In any event, it is argued that the applicant was a party to the interdict proceedings and is in possession of all relevant documents relating to the interdict.

11. Section 261 (1) of the Merchant Shipping Act 57 of 1951 states:

"When owner not liable for whole damage

1. The owner of a ship, whether registered in the Republic or not, shall not, if any loss of life or personal injury to any person, or any loss of or damage to any property or rights of any kind, whether movable or immovable, is caused without his actual fault or privity –

(a)....

(b) if no claim for damages in respect of loss of life or personal injury arises, be liable for damages in respect of loss of or damage to property or rights to an aggregate amount exceeding 66,67 special drawing rights for each ton of the ship's tonnage ..."

12. In terms of Section 261 (3) of the MSA the entitlement to limit only arises in respect of: -

"claims for damages in respect of .... loss of or damage to property or rights arising on any single occasion, and in the application of the said provisions claims for damages in respect of loss, injury or damage arising out of two or more distinct occasions shall not be combined"

13. In its plea the defendant avers that:

"26. The defendant and the owner of the defendant are entitled to bring proceedings for an order limiting their total liability in respect of all claims arising out of the same occasion to the amount defined in Section 261 (1) (b) read with Section 262 of the Merchant Shipping Act 57 of 1951.

27. In the event that the defendant be found liable to the plaintiff then judgment against it in respect of its liability falls to be postponed until judgment in respect of all other actions instituted and arising from the same occasion and the aforementioned proceedings to limit liability have been concluded".

14. It is not disputed that the vessel has a gross registered tonnage of 92,191 mt. The value of the special drawing right is currently about R 13,80. Consequently, if the limitation plea is valid, the respondent and her owner will not be liable for damages in excess of R 84,819,960 (92.191 x 66.67 x 13.80). The Anyang arbitration claim is in the amount of US $ 11,234,054,47 which exceeds the limitation amount.

15. The applicant submits that the respondent alleges that all the various claims *"arise out of the same incident."* The respondent also seeks, in the alternative, for an order declaring the respondent liable to the applicant, subject to the provisions of Section 261(1)(b) of the MSA. In addition, the respondent requests an order staying the proceedings pending:

15.1 The determination of the proceedings in cases AC 03/10 and AC 38/10 and any other proceedings that may be brought arising out of the same occasion; and

15.2 The determination of proceedings brought or to be brought by the respondent and/or owner of the respondent to limit liability to the applicant and all other claimants arising out of the same occasion in terms of Section 261(1)(b) of Act 57 of 1951.

16. Applicant therefore submits that the following matters, amongst others, are in issue in respect of the defendant's defence of limitation of liability:

16.1 Whether the Anyang arbitration claims, as well as all other claims referred to by the defendant, arise out of *"the same incident"* as alleged;

16.2 The validity, nature, merits and quantum of each of those claims, and in particular the Anyang arbitration claim;

16.3 Whether the respondent has met the requirements of Section 261(1)(b) and (3) of the MSA.

17. Respondent contends that it pleaded the limitation defence in order to obtain the fullest protection of Section 261 and to ensure that the limit provided for is paid only once, to bring its own claim for an order proportionally reducing its liability in respect of the potential claims against it such that the total liability does not exceed the maximum statutory amount. Respondent submits that a limitation claim is permitted in English Courts, with reference to **The "Volvox Hollandia" (CA)** [1988] 2 Lloyd's Rep 361 at 371 and **Caspian Basin vs Bouygues Offshore SA and Others** (No 4) (QB) [1997] 2 Lloyd's Rep 507 at 525 – 526. Similarly, it is also allowed in South Africa as was done in **Nagos Shipping Ltd v Owners, Cargo Lately Laden on Board the MV "Nagos", and Another** 1996 (2) SA 261 (D&CLD). Respondent further contends that a defence based on limitation of liability is binding only in respect of the claim of the particular plaintiff in whose action it is raised. In describing the nature of a limitation claim, respondent referred to **The Happy Fellow** (QB) [1997] 1 Lloyd's Rep 130 at 134 where Longmore J stated:

> **"A limitation action is thus a special proceeding to which all potential claimants are made parties and includes a power to stay proceedings to enforce any judgment which may have been obtained in other proceedings ..... It seems to me therefore that, in what I may call a multi-party situation, a ship owner's right to limit is not an incident or attribute of a claimant's claim but an altogether different right to have all claims scaled down to their proportionate share of a limited fund."**

18. Respondent accordingly argues that its plea is a recordal of its entitlement to the full protection of Section 261(1)(b). Consequently, it is argued that the limitation of respondent's liability to Anyang will not be relevant in the applicant's action. There is thus nothing in relation to Anyang's claim that requires to be discovered.

19. Rule 35(7) is designed to assist a party that is dissatisfied with the discovery or supplementary discovery that has been made and remedies under Rule 35(3) have been exhausted (**Tractor & Excavator Spares (Pty) Ltd v Groenedijk** 1976 (4) SA 359 (W)). Rule 35(7) empowers the Court to dismiss a claim, or strike out the defence, if a party fails to give discovery in compliance with the Rules. Discovery was defined in **STT Sales (Pty) Ltd v Fourie** 2010 (6) SA 272 (GSJ) at 276 C-D as "*a tool used to identify factual issues once legal issues are established*". The purpose of discovery is not only to assist the parties as well as the court in determining the truth, but also to save costs as stated in **Air Canada v Secretary of State for Trade** [1983] 2 AC 394 at 445 – 446 and **Santam Ltd and Others v Segal** 2010 (2) SA 160 N at 162 E – F.

20. With regard to the object of discovery of documents in terms of Rule 35 Tredgold J said the following in **Durbach v Fairway Hotel Ltd** 1949 (3) SA 1081 SR at 1083:

"The whole object of discovery is to ensure that before trial both parties are made aware of all the documentary evidence that is available. By this means the issues are narrowed and the debate of points which are incontrovertible is eliminated. It is easy to envisage circumstances in which a party might possess a document which utterly destroyed his opponent's case, and which might yet be withheld from discovery on the interpretation which it is sought to place upon the rules. To withhold a document under such circumstances would be contrary to the spirit of modern practice, which encourages frankness and the avoidance of unnecessary litigation".

21. Schultz AJ (as he then was) in **Crown Cork & Seal Co Inc and Another v Rheem SA (Pty) Ltd and Others** 1980 (3) SA 1093 (W) at 1095 quoted with approval what an English Judge said in **Church of Scientology of California v Department of Health and Social Security** (1979) I WLR 723 (CA) at 733 C-E that:

"The object of mutual discovery is to give each party before trial all documentary material of the other party so that he can consider its effect on his own case and his opponent's case, and decide how to carry on his proceedings or whether to carry them on at all..... Another object is to enable each party to put before the Court, all relevant documentary evidence...."

22. **In Sunderland Steamship P and I Association v Gatoil International (The "Lorenzo Halcoussi")** [1988] 1 Lloyd's Rep 180 (QB) at 184 referred to obiter in **Replication Technology Group and Others v Gallo Africa Ltd** 2009 (5) SA 531 (GSJ) at 535 G, the court said the following:

"Our law... recognises that proper mutual discovery in litigation and arbitration is in the public interest in that it promotes settlements; it reduces [the chances of] a party being taken by surprise; and enables the Judge to decide the case in the light of contemporary documentary material which is often more valuable than the oral testimony. On the other hand, our law recognizes that no sensible civil justice system can be organized on the basis that time, money and inconvenience [are] irrelevant. Nevertheless, the scope of discovery is wide. It

extends to documents having only a minor or peripheral bearing on the issues, and to documents which may not constitute evidence but which may fairly lead to an enquiry relevant to the issues. But a court may, of course, refuse to order discovery to the extent that the discovery is not necessary for fairly disposing of the matter, and to the extent that it would be oppressive to order it".

23. In **Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others** 1999 (2) SA 279 (T) at 316, the court reviewed the authorities relating to relevance in the context of Rule 35(1), (2) and (3) and cited with approval the principle laid down in **Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co** (1882) 11 QBD 55 (CA):

> **"It seems to me that every document relates to the matter in question in the action which, it is reasonable to suppose, contains information which *may* – not which *must* – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly" because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences."**

24. In **Durbach v Fairway Hotel Ltd (supra)** at 1083 it was stated that "**A party is required to discover every document relating to the matters in question, and that means relevant to any aspect of the case. This obligation to discover is in very wide terms. Even if a party may lawfully object to producing a document, he must still discover it."** It has been held that the relevance of the documentation is to be determined with reference to the pleadings and the issues raised by them. (**Swissborough Diamond Mines of RSA and Others v Government of the Republic of South Africa and Others (supra)** at 317 A-D; **Federal Wine and**

Brandy Co Ltd v Kantor 1958 (4) SA 735 (E) at 753 D-G; **Copalcor Manufacturing (Pty) Ltd and Another v GDC Hauliers (Pty) Ltd** 2000 (3) SA 181 (WLD) at 194 A)).

25. The test for discoverability in the context of privilege or relevance was set out in **Continental Ore Construction v Highveld Steel and Vanadium Corporation Ltd** 1971 (4) SA 589 (W) at 598 D-F:

> **"The test of discoverability or liability to produce for inspection, where no privilege or like protection is claimed, is still that of relevance; the oath of the party alleging non-relevance is still *prima facie* conclusive, unless it is shown on one or other of the bases referred to above that the Court ought to go behind that oath; and the *onus* of proving relevance, where such is denied, still rests on the party seeking discovery or inspection".**

26. The courts are generally reluctant to go behind a discovery affidavit. In **Continental Ore Construction v Highveld Steel and Vanadium Corporation Ltd** (supra) at 597 H – 598 A the following was stated:

> **"The Court will go behind the affidavit only if it is satisfied –**
>
> i. **from the discovery affidavit itself; or**
> ii. **from the documents referred to in the discovery affidavit; or**
> iii. **from the pleadings in the action; or**
> iv. **from any admissions made by the party making the discovery affidavit; or**
> v. **from the nature of the case or the documents in issue,**
>
> **that there is a probability that the party making the affidavit has or has had other relevant documents in his possession or power or has misconceived the principles upon which the affidavit should be made."** (Also See: **Federal Wine and Brandy Co. Ltd v Kantor** 1958 (4) SA 735 (E) at 749 G).

27. In England there are no statutory provisions in the Arbitration Act of 1996 addressing confidentiality in arbitrations. However, in terms of English Law a duty of confidentiality is implied by arbitral parties. The classical view of the principle of confidentiality in arbitration was established in **Dolling-Baker v Merrett** [1991] 2 All ER 890 (CA). The Court held that the obligation extended to all documents generated in the process of arbitration including the award.

28. In **Hassneh Insurance Co of Israel & Others v Stuart J Mew** [1993] 2 Lloyd's Rep 243 the English Commercial Court relied on **Dolling-Baker supra** in finding that arbitration proceedings are subject to an implied duty of confidentiality. However, the court found that it shall not be absolute and that disclosure would be allowed if it is reasonably necessary for the establishment or protection of an arbitrating party's rights against a third party. This exception related only to the award and its reasons and did not cover pleadings, witness statements and transcripts.

29. The principle was confirmed in **Ali Shipping Corporation v Shipyard Trogir** [1998] 2 All ER 136 (CA). The English Court of Appeal held that confidentiality of the arbitral process was implied by law "*as a necessary incident of a definable category of contractual relationship*".

30. In **Associated Electric and Gas Insurance Services Ltd (AEGIS) v European Reinsurance Company of Zurich** [2003] UKPC 11 the English Court indicated a willingness to overrule the implied principle of confidentiality. An express term was agreed upon between the parties and the case turned on the interpretation of the confidentiality clause. The Court ruled at para [8] that the "*legitimate use of an*

earlier award in a later, also private, arbitration between the same two parties would not raise the mischief against which the confidentiality agreement is directed." The Court ruled that the award could be referred to in subsequent proceedings to establish an estoppel defence against a losing party. However, AEGIS does not deal with a situation where the parties seek to rely on an arbitral award in subsequent proceedings where the parties to the arbitration are not identical.

31. In **John Forster Emmott v Michael Wilson and Partners Limited** [2008] EWCA Civ 184 the English Court of Appeal reaffirmed the principle of implied confidentiality and recognized four principle exceptions to the general rule of confidentiality, namely: -

i. where there is consent;

ii. where there is an order, or leave of the court;

iii. where the disclosure is reasonably necessary for the protection of the legitimate interest of an arbitrating party;

iv. where the interest of justice require disclosure, including on the grounds of public interest.

32. In **Westwood Shipping Lines Inc. and another v Universal Schiffahrtsgesellschaft MBH and another** [2012] EWHC 3837 (Comm), the Court considered whether to allow the claimant to rely on documents used in an arbitration. The claimants argued that there had been a waiver of confidentiality in the documents in question because either:

1. The liquidator had referred to them at a creditors meeting.
2. They were in the public domain because they had been referred to in a judgment of the court regarding enforcement of the award.

3. One of the exceptions to confidentiality noted in **Emmott v Michael Wilson (supra)** applied.

33. The judge was not persuaded that either of the first two grounds was established. However, with reference to **Emmott**, the Court concluded that disclosure was justifiable either because it was reasonably necessary for the protection of the claimants' legitimate interests, or because the interest of justice required it. The Court found that the claimants had an arguable case of unlawful conduct which could not be properly pursued without access to arbitration documents, had a legitimate interest in using the material, and the interest of justice required disclosure.

34. It initially appeared that French Law also recognizes such an obligation. In **Aïta v Ojjeh** 1986 Revue de L'Arbitrage 583 (Cour d' Appel de Paris, Feb 18, 1986) the Court dismissed an action to annul an arbitral award rendered in London, but ruled that the annulment action violated the principle of confidentiality. The grounds on which the obligation is based or any exceptions as recognized by English Law were not considered in the case. However, in **National Company for Fishing and Marketing (Nafimco) v Foster Wheeler Trading Company** 2004 Rev, ARB. 647, which case also related to the production of documents generated during arbitration, the Paris Court of Appeal denied a claim for breach of confidentiality of arbitration on the basis that a party has a duty to provide explanations for the existence and scope of such confidentiality. The Court held that an implied duty of confidentiality should be justified by the protection of a legitimate interest. It was furthermore held that the plaintiff failed to establish that such an obligation exists under French Law.

35. The Singapore High Court adopted the English position, upholding the doctrine of implied confidentiality as seen in the Singaporean cases of **Myanma Yaung Chi Oo Co Ltd v Win Win Nu** [2003] 2 SLR 547 and **AAY v AAZ** [2009] SGHC. The principle was also tacitly accepted in Hong Kong in the case of **Oriental Press Group Ltd v Next Magazine Publishing** Ltd [1998] 40 HKCU 1.

36. In **United States v Panhandle Eastern Corp, et al** 118 FRD 346 (D Del 1988) the case involved a request by the US Government for the production of documents used in an International Chamber of Commerce (ICC) arbitration in Switzerland. The Court held that without an agreement between the parties or procedural rules that explicitly guarantee confidentiality, no doctrine of confidentiality could be implied. Furthermore, it was held that the ICC Rules place no obligation of confidentiality on arbitrating parties.

37. The High Court of Australia declined to recognize a broad obligation of confidentiality applying to all documents and information provided in and for the purposes of arbitration, as followed by English Courts. In **Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)** (1995) 128 ALR 391 (HCA), one of the parties was compelled by the Minister of Energy to produce certain information, as well as disclosure of an award. The Court held that confidentiality, unlike privacy, is not "*an essential attribute*" of commercial arbitration. The Court therefore held that the Minister of Energy and Minerals, who was not a party to the arbitration, was entitled to discovery of arbitration documents and information. **Mason** CJ observed that complete confidentiality could not be achieved for the following reasons. First, no obligation of confidentiality attaches to the witnesses.

Secondly there are various circumstances in which an arbitration award may come before a Court involving disclosure to the Court by a party to the arbitration and publication of court proceedings. Thirdly, there are other circumstances in which an arbitration party must be entitled to disclose to a third party the existence and details of the proceedings and the award. The Court found that any such obligation of confidentiality must be of contractual origin.

38. **Brennan** J, concurring with **Mason** CJ, stated that any undertaking of confidentiality was not absolute. A number of exceptions arose:

> **"Where a party is in possession of a document or information and is under a duty at common law or under statute to communicate the document or information to a third party, no contractual obligation of confidentiality can prohibit the performance of that duty. Moreover, a party may be under a duty, not necessarily a legal duty, to communicate documents or information to a third party who has an interest in the progress or outcome of the arbitration."**

At paragraph 6 he went on to clarify the duty or obligation as follows:

> **"I would hold that, in an arbitration agreement under which one party is bound to produce documents or disclose information to the other for the purposes of the arbitration and in which no other provision for confidentiality is made, a term should be implied that the other party will keep the documents produced and the information disclosed confidential except (a) where disclosure of the otherwise confidential material is under compulsion of law; (b) where there is a duty, albeit not a legal duty, to the public to disclose; (c) where disclosure of the material is fairly required for the protection of the party's legitimate interests; and (d) where disclosure is made with the express or implied consent of the party producing the material."**

(The Australian view was subsequently confirmed in **Commonwealth of Australia v Cockatoo Dockyard Pty Ltd (1995) 36 NSWLR 662.**).

39. Contrary to the approach followed in **Esso Australia** (supra), New Zealand recognizes a broad obligation of confidentiality. Section 14 of the New Zealand Arbitration Act 1996 provides that *"... **an arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that the parties shall not publish, disclose, or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings**".*

40. The approach in **Esso Australia (supra)** was however followed in Sweden in **Bulgarian Foreign Trade Bank Ltd (Bulbank) v A.I. Trade Finance Inc** (2001) XXVI Y.B. Comm. Arb. 291(Swedish Supreme Court 27 October 2000). The Court held that a provision that arbitration hearings are private and confidential did not automatically imply a general duty of confidentiality. Accordingly there are only two ways to ensure confidentiality of arbitration proceedings in Swedish law, namely, by express contract or by adopting arbitration rules that expressly provide for it.

41. Other than Quebec, Canadian courts have not yet decided the issue. The Supreme Court of British Columbia in **Hi-Seas Marine Ltd v Boelman** 2006 BCSC 488; (2006) 17 B.L.R. (4th) 240 noted the contradictory position taken by the English and Australian Courts and observed that *"it may be necessary for Courts of this province to comprehensively address [it]"* but found it unnecessary to deal with in the case before it. (Also **see Adesa Corporation vs Bob Dickenson Auction Services Ltd** (2002) 73 OR (3d) 787); **Tanner v Clark** (2003) 63 OR (3d) 508 (CA)). In **Rhéaume v Société d'investissements l'Excellence inc**, 2010 QCCA 2269 the Quebec Court of Appeal refused to recognize an implicit obligation of confidentiality associated with the arbitral process. **In Telesat Canada v Boeing Satellite**

Systems International Inc., 2010 ONSC 22 the Ontario Superior Court of Justice recognized a general public interest in preserving confidentiality of materials filed in court about a pending arbitration. Arbitration in Canada is generally assumed to be confidential although there is no legislation and little jurisprudence on the issue.

42. Courts in Australia, United States and Sweden have therefore rejected a general implied duty of confidentiality. There is also no legislative basis for privacy and confidentiality of arbitration proceedings in South Africa The Arbitration Act 42 of 1965 does not automatically render arbitration proceedings confidential (See **Replication Technology Group and Others v Gallo Africa Ltd (supra)** at 545 H) . There is no uniform universal consensus on the confidentiality of arbitration proceedings. The principle is not sacrosanct and should be viewed from the circumstances of each individual case. In this matter there is no confidentiality agreement in respect of the arbitration proceedings. The arbitration proceedings, although private, are not necessarily confidential. There is also no suggestion that the documents sought are commercially sensitive.

43. The respondent, in an effort to protect its own legitimate private interests, has elected to disclose limited information concerning the arbitration proceedings. . Disclosure for this reason is permitted in terms of one of the exceptions in English Law. Respondent deemed partial disclosure reasonably necessary in order to protect its rights towards third parties, and to raise a limitation defence. Respondent now seeks to withhold full disclosure in circumstances where it alleges that the present and arbitration claims arose from the same incident, and that it intends to stay proceedings to pursue a limitation claim. It is opportunistic of the Respondent to disclose limited information regarding the arbitration proceedings when it is beneficial

for Respondent, but to withhold full disclosure claiming confidentiality. Having already made partial disclosure, Respondent failed to show that full disclosure would result in any form of prejudice. A crucial issue in this case is whether the claims arose from the same incident. Applicant needs to establish whether there is a connection between the arbitration claims and its own claim. It is therefore necessary for the applicant to have access to the documents in order to assess and prepare its case. The information sought is directly or indirectly relevant to the issues in dispute. I am satisfied that it is necessary to disclose the arbitration information in order to achieve the fair disposal of this action. It would not be consistent with the fair disposal of an action to require the applicant to simply accept respondent's limited disclosures, and be denied the opportunity to review its position in respect of a possible limitation action.

44. Respondent raised a limitation plea. I am of the view that respondent should not be allowed to use the cloak of confidentiality to withhold documents relevant to a case in a different jurisdiction, where the case raised the same or similar allegations, and where same is pleaded by respondent. Maintaining secrecy around the arbitration and other proceedings "*arising from the same incident*" undermines the search for the truth in adjudicating the matter. In these circumstances the applicant is entitled to full disclosure of the legal and factual basis of Anyang's claims, as well as any information pertaining to any case "*arising from the same incident*". I do not deem it necessary to determine whether English Law is applicable in this matter. However, even if I should accept that English Law is applicable, I am of the view that the disclosure of the arbitration documents would be permitted in terms of one of the exceptions to confidentiality. The circumstances of this case are of such a nature that the public interest clearly overrides the private obligation of confidentially. I

accordingly find that the documents are relevant, and that it is in the interest of justice that they be disclosed to the Applicant. I abide by the statement by Lord Denning in **Riddick v Thames Board Mills Ltd** [1977] 3 All ER 677 (CA) at 687, cited with approval in **Crown Cork & Seal Co Inc. and Another v Rheem South Africa (Pty) Ltd and Others** (supra) at 1069B:

> **"[t]he reason for compelling discovery of documents in this way lies in the public interest in discovering the truth so that justice may be done between the parties. That public interest is to be put into the scales against the public interest in preserving privacy and protecting confidential information. The balance comes down in the ordinary way in favour of the public interest of discovering the truth, ie in making full disclosure".**

45. In the result the following order is made:

1. **The respondent is ordered to comply with the applicant's Notice in terms of Uniform Rule 35(3) which was served on the respondent's attorneys on 19 November 2012 within 10 days of the date on which this order is granted. In particular, the respondent is directed to make the following documents available to the applicant for inspection:-**

   1.2 All pleadings in the London arbitration brought by Anyang Steel International Trading Co Ltd against the owner of the respondent, and any other documents filed of record and/or exchanged between the parties in, or in relation to such arbitration and/or the London arbitration brought by Kumba Shipping Hong Kong Limited against the owner of the respondent.

   1.3 Documents discovered and/or made available by the parties to each other in the aforesaid proceedings; and

   1.4 All documents in which claims against the respondent or the owner have been intimated and/or demanded by Kumba Shipping Hong Kong Limited, arising out of the incident referred to in paragraph 25 of the defendant's plea.

2. **Failing compliance with paragraph 1, the plaintiff is granted leave to apply to this Court on the same papers (duly amplified as necessary), for an Order striking out the defendant's defence to the plaintiff's claims with costs.**

3. **The defendant is ordered to pay the costs of this application, including the costs of two counsel.**

Goliath

GOLIATH J