IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

EXERCISING ITS ADMIRALTY JURISDICTION

DELETE WHICH IS NOT APPLICABLE
[1] REPORTABLE: YES
[2] OF INTEREST TO OTHER JUDGES: NO
[3] REVISED: YES
DATE SIGNATURE

Case No: A18075/16

In the matter between:

CENTRAL BRIDGE TRADING 333 CC	Applicant
and	
XTREME MOTION MARKETING CC	Respondent

In re:

XTREME MOTION MARKETING CC	Applicant
and	
CENTRAL BRIDGE TRADING 333 CC	Respondent

Case Summary: Shipping – Admiralty law – Maritime claim – Enforcement – Arrest – Cargo - Application for setting aside arrest - Arrest to institute action in rem effected in terms of s 3(4) and s 3(5) of the Admiralty Jurisdiction Regulation Act No. 105 of 1983 - Goods can only be described as 'cargo' within the meaning of s 3(5)(c), and thus amenable to arrest, once brought onto the ship – goods which are to be carried on a ship ('prospective cargo') are not included - Arrest set aside.

JUDGMENT

MEYER, J

[1] This is an urgent application brought by the applicant, Central Bridge Trading 333 CC (Central Bridge), for the setting aside of the arrest of approximately 884.995 metric tons of its chrome concentrate, some of which were containerised and the greater part stockpiled, at the premises of Ingwe Shipping (Pty) Ltd in City Deep, Johannesburg (Ingwe). The core business of Central Bridge is the production of chrome concentrate at its wash plant in the Mooinooi area. The chrome concentrate produced is sold and exported to China via the Maputo and Durban harbours.

[2] Part of the chrome concentrate was arrested on 27 May and the balance on 1 June 2016 at the instance of the respondent, Xtreme Motion Marketing CC (Xtreme Motion). The arrest of the chrome concentrate to institute an action *in rem* was effected in terms of the provisions of s 3(4) and s 3(5) of the Admiralty Jurisdiction Regulation Act No. 105 of 1983 (the Act), on the grounds that Central Bridge as owner of the chrome concentrate was liable to Xtreme Motion in an action *in personam* in respect of its cause of action.

[3] The action *in rem* instituted by the arrest was for the enforcement of an alleged maritime claim arising from clearing and forwarding services which Xtreme Motion had rendered to Central Bridge and the reimbursement of disbursements incurred by it in its capacity as Central Bridge's appointed clearing and forwarding agent mandated by it to procure the containerisation of 2 500 metric tons of chrome concentrate in 92 containers, their road transport to Durban and loading on board the

MV *Ever Dynamic* at the Port of Durban in order for the chrome concentrate to be carried by sea to Shangai, China. The MV *Ever Dynamic* was due to leave the Durban harbour on 25 May 2016. The shipment of the chrome concentrate on board the MV *Ever Dynamic* never took place.

[4] Before dealing with the basis of the challenge to the arrest, it is necessary to sketch the background to the *in rem* action briefly. The precise terms of the agreement concluded between Central Bridge and Xtreme Motion are in dispute. But in the execution of its contractual obligations Xtreme Motion inter alia arranged for the carriage of the chrome concentrate on the MV *Ever Dynamic*; the delivery of 92 empty containers to Ingwe's premises in which the chrome ore was to be containerised; the collection and road carriage of raw ore from Steelpoort in Mpumalanga to Central Bridge's production plant in Mooinooi; the road carriage of the chrome concentrate from Central Bridge's premises in Mooinooi to Ingwe's premises in Johannesburg where the chrome concentrate was to be containerised; and for the carriage of the containers by road from Ingwe's premises in Johannesburg to the Durban harbour.

[5] Central Bridge terminated the mandate of Xtreme Motion on 20 May 2016. The circumstances which resulted in the termination of the mandate are the subject of factual disputes on the papers. It occurred at a stage when 31 containers had been filled with the chrome concentrate of which 27 had already been dispatched to Durban by road. Xtreme Motion contends that its claim had already accrued and that it became payable immediately when Central Bridge terminated the agreement. The alleged indebtedness of Central Bridge is also a matter that is subject to disputes of fact on the papers.

[6] When it comes to arrests procured under s 3(4) and 3(5) of the Act, the onus is on the arresting party to prove all the elements that justify the arrest (see *Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris* 1989 (3) SA 820 (A) at 834C-E), including the requirements that the claim is a 'maritime claim' as defined by the Act; that the court has jurisdiction, or will have jurisdiction, to try the merits of the claim upon arrest (Admiralty Rule 4(3)); that the claimant has a maritime lien over the property to be arrested or that it has a claim which, if proved, lies against the owner of the property *in personam* (s 3(4)); and that the property to be arrested is property amenable to arrest in terms of s 3(5).

[7] Xtreme Motion contends that its claim is for its remuneration and reimbursement of the disbursements made by it on behalf of Central Bridge in its capacity as clearing and forwarding agent in respect of the chrome concentrate that was to be carried on the MV *Ever Dynamic*. Its claim, so it contends, thus falls within the definition of 'maritime claim' in s 1(p)(i), which definition includes

'. . . any claim for, arising out of or relating to . . . the remuneration of, or payments or disbursements made by, or the acts or omissions of, any person appointed to act or failed to act . . . as an agent, whether as a ship's, clearing, forwarding or other kind of agent, in respect of any ship or any goods carried or to be carried or which were or ought to have been carried in a ship . . .'.

Xtreme Motion further contends that there is *in personam* liability on the part of Central Bridge (the owner of the chrome concentrate) should its claim succeed.

[8] Accepting (without deciding) that Xtreme Motion has succeeded in proving on a balance of probabilities that its claim is a 'maritime claim' as contemplated in the Act and that its claim, if proved, lies against Central Bridge *in personam*, I now turn to the real bone of contention between the parties, which is whether the chrome

concentrate arrested is property amenable to arrest in terms of s 3(5). Section 3(5)(c) (on which Xtreme Motion relies) provides for the arrest of 'property in respect of which the claim lies' to institute an action *in rem* and defines 'property' as including 'the whole or any part of the cargo'.

[9] Xtreme Motion contends that its claim lies against the chrome concentrate, which is 'cargo' within the meaning s 3(5)(c). The chrome concentrate, so it contends, became 'cargo' once identified and earmarked as being destined to be shipped as part of a single consignment on board the MV *Ever Dynamic*. (Whether all the arrested chrome concentrate was identified and earmarked as being destined to be shipped on board the MV *Ever Dynamic* is a matter of controversy on the papers.) Xtreme Motion contends that the placement of goods on board a ship or vessel is not necessarily determinative of the status of the goods as 'cargo'. Whether goods are 'cargo' within the meaning of s 3(5)(c), Xtreme Motion contends, depends on the intention of the possessor and the physical separation of the goods from other goods in preparation for shipment on board a vessel. In challenging the arrest, Central Bridge on the other hand contends that the chrome concentrate under arrest could only have become 'cargo' within the meaning of s 3(5)(c) once it had passed the rail of the MV *Ever Dynamic*. No other meaning, so it contends, can be ascribed to the word 'cargo' used in s 3(5)(c).

[10] The correct approach to the construction of s 3(5)(c) is to consider the ordinary meaning of the language used, read in context. (See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), para 18, and *Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA), para 12.) The word 'cargo' is not defined in the Act. We know from decided cases that it would be wrong to regard goods as ceasing to be properly described as

'cargo' immediately they are over the ship's side. An example is *Golden Meats & Seafood Supplies v Best Seafood Import* 2011 (2) SA 491 (KZD), where Wallis J dismissed an application for the setting aside of arrested cargo of crab that had been shipped from Mombasa to Durban and stored in a place at the Durban harbour.

[11] But when can goods, such as the chrome concentrate *in casu*, be described as 'cargo' within the meaning of s 3(5)(c)? Its ordinary meaning, read in context, leads me to conclude that goods can only be so described once they have been brought onto the ship or vessel. Until then the goods that are identified and earmarked as being destined to be shipped as part of a single consignment on board a ship remain 'potential cargo'.

[12] The property amenable to arrest in terms of s 3(5) is maritime property. (See John Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 2nd Ed at 84.) The dictionary meanings of the word 'cargo' are: 'the goods carried by a ship, aircraft, lorry, etc.; a load'; '[l]oad (with cargo); carry as cargo' (*The New Shorter Oxford English Dictionary on Historical Principles* 1993 Vol 1 at 338-339); and 'cargoload; the freight or lading of a ship; shipload' (*The Shorter Oxford English Dictionary on Historical Principles* 3rd Ed at 286). It would be a departure from the ordinary meaning of the word 'cargo' if goods which are to be carried on a ship – 'prospective cargo' – are included in its s 3(5)(c) meaning. Nothing in context warrants such a departure.

[13] Support for my interpretation is to be found in the opinion of Lord Cross of Chelsea in *National Dock Labour Board v John Bland & Co Ltd and others* [1971] 2 All ER 779, at 789h-j, where he said:

'I cannot agree that the definition of 'cargo' in the 1946 Act obliges one to depart from the ordinary meaning of the word so far as concerns anything which has been carried in a ship.

In ordinary parlance all things carried in a ship do not automatically cease to be cargo as soon as the ship berths and they are taken out of her. Depending on how they are dealt with they may continue to be fairly describable as 'cargo' for a period – in some cases possibly a considerable period – after they have left the ship. On the other hand, goods which are to be carried on a ship – prospective cargo – are not so naturally described as 'cargo' and that perhaps is why the legislature thought it necessary to make it clear by express words that 'cargo' in this Act was to include prospective cargo.'

[14] Xtreme Motion has thus failed to prove that the arrested chrome concentrate is maritime property amenable to arrest in terms of s 3(5) and the arrest must, therefore, be set aside.

[15] In the result the following order is made:

(a) This application is heard as an urgent application as contemplated in rule 6(12)(a) of the Uniform Rules of Court, and the normal rules pertaining to forms and service are dispensed with.

(b) The warrant of arrest dated 26 May 2016 and executed on 27 May 2016 and the warrant of arrest dated 1 June 2016 and executed on the same day, are hereby set aside.

(c) The Sheriff of Johannesburg is directed to release the chrome concentrate that has been arrested in executing the warrants of arrest referred to in paragraph (b) of this order.

(d) The respondent is to pay the costs of the application.

P.A. MEYER
JUDGE OF THE HIGH COURT

Date heard:	15 June 2016
Date of judgment:	17 June 2016
Applicant's counsel:	JA du Plessis
Instructed by:	Nardus Grové Attorneys, Johannesburg
Respondent's counsel:	AJ Lamplough (assisted by LM Spiller)
Instructed by:	Bowman Gilfillan Attorneys Inc, Sandton