

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT ELIZABETH
(In the exercise of its admiralty jurisdiction in terms of Act 105 of 1993, as amended)

CASE NO: AC 216/2018
Dates heard: 8, 12 & 13 February 2018
Date delivered: 20 February 2018

Admiralty action *in rem* MFV Qavak

In the matter between

TWENDE AFRICA GROUP (PTY) LTD
t/a TAG MARINE

Plaintiff

and

MFV QAVAK

Defendant

In the application

FISHERMAN FRESH CC

Applicant

And

TWENDE AFRICA GROUP (PTY) LTD
t/a TAG MARINE
Respondent

Plaintiff /

JUDGMENT

GOOSEN, J.

- [1] This is an urgent application brought by the owner of a commercial fishing vessel, the MFV Qavak, to reconsider and set aside a warrant of arrest of the vessel issued by the Registrar of this Court on 26 January 2018. The warrant of arrest was sought *ex parte* by the plaintiff pursuant to section 3 (4) of the Admiralty Jurisdiction and Regulation Act, Act 105 of 1983 (hereinafter “the Admiralty Act”). The application is opposed.

- [2] The matter came before this Court on 10 February 2018. The question of urgency remained in dispute. During argument of the matter certain issues arose which warranted the submission of further written argument by both parties. The judgment was accordingly reserved in the application until 20 February 2018 in order to enable the parties to file supplementary heads of argument on 12 and 13 February respectively. This court is indebted to counsel for the helpful submissions made.

- [3] The MFV Qavak is a commercial fishing vessel, which until recently was owned by M C Donahue Fishing Ltd (hereinafter “Donahue”). Donahue is, or was, a commercial fishing enterprise conducting business in Ireland. It operated the MFV Qavak, *inter-alia*, in Irish waters.

- [4] The vessel is now owned by Fisherman Fresh CC, the applicant in this application. The applicant is a commercial fishing corporation which conducts business in Port Elizabeth. It owns or operates several fishing vessels under fishing licences issued by the relevant the South African authorities.

- [5] The plaintiff is a broker with its registered office in Cape Town. It carries on the business of a ship broker facilitating, *inter-alia*, the sale and purchase of shipping vessels.

- [6] On 26 January 2018 the plaintiff obtained a warrant of arrest of the defendant vessel. On that day it commenced an Admiralty action *in rem* by issue of a summons against the defendant vessel. The summons alleges that the plaintiff's claim against the defendant vessel is for:

Payment of the sum of R713,769.58, which amount is commission due, owing and payable by Defendant to Plaintiff arising out of professional ship brokering services rendered by Plaintiff to Defendant *circa* August 2017 and which amount, despite demand, remains unpaid.

- [7] The claim also includes a claim for payment of interest on the said amount.
- [8] The applicant launched the present application on 1 February 2018. It provided in its notice of motion for the filing of a notice of opposition and answering affidavits upon truncated time periods and enrolled the matter for hearing on 8 February 2018. It seeks an order that the defendant vessel be released forthwith from its arrest and that the summons issued by the plaintiff be set aside as irregular and of no force and effect for want of compliance with the peremptory provisions of s 3 (4) of the Admiralty Act.

Urgency

- [9] In respect of urgency it is alleged by the applicant that matters involving the arrest of a vessel are inherently urgent, more particularly where the warrant of arrest was obtained *ex parte*. A party affected thereby is therefore entitled to approach the court on an urgent basis for reconsideration of the warrant. It is further alleged that the vessel was recently purchased and is presently undergoing refurbishing so that it may be employed in commercial fishing operations conducted by the applicant. The

applicant states that the refurbishing will shortly be completed and that the vessel will be able to be employed in fishing operations from the end of February. The refurbishing of the vessel involves the construction of additional crew accommodation. The applicant has employed an additional 16 crew to for the vessel. It is pointed out that the purchase of the vessel, in an amount of approximately R11 million, has been financed. The applicant is under obligation to service this loan and requires the vessel to be economically active. Once it is involved in fishing operations it is anticipated that it will generate revenue of approximately R500 000 per month which will enable the applicant to service its obligations and meet the costs associated with the employment of the crew, including the additional 16 staff members employed. In the event that the vessel remains under arrest the applicant will suffer significant financial losses. It is submitted that these commercial interests, together with the prejudice suffered by virtue of the arrest, render the matter sufficiently urgent to warrant enrolment upon the truncated time periods provided for in the notice of motion.

[10] The plaintiff takes issue with the urgency of the matter. It contends that on this basis alone the application ought to be struck from the roll. It was argued that it is incumbent on the applicant to persuade a court that its non-compliance with the rules of Court is justified on the grounds of urgency. It was submitted that the intention of the rule relating to urgency is that a modification of the time periods is permissible only in the respects and to the extent that is necessary in the circumstances and that the degree of relaxation of the rules should not be greater than the exigencies of the case demand.¹

[11] In response to the application the plaintiff issued a notice in terms of Rule 35(12) calling on the applicant to produce the fishing licences referred to in its affidavit. In

¹ Caledon Street Restaurants CC v D'Aviera [1998] JOL 1832 (SE) at 7-8

response the applicant furnished two fishing licences, both of which name another vessel, the MFV Cape Maclear, as the vessel licenced to fish. The plaintiff accordingly alleges that the applicant is unable to establish that the MFV Qavak will be able to commence commercial fishing operations or that it is required to do so. The plaintiff further alleges that the applicant, which also owns the MFV Cape Maclear, will in any event be able to continue its commercial fishing operations and that the catching of the relevant quotas can be achieved once the matter has been finalised in due course.

[12] In its reply the applicant points out that the fishing licences are to be transferred to the MFV Qavak once the refurbishing is complete so that it may commence fishing operations.

[13] The plaintiff's contentions in regard to the uncertainty as to when the MFV Qavak may be able to commence operations on account of the need to transfer licences and have the vessel certified as seaworthy carry some force. They do not however address the case made out by the applicant to secure the release of the defendant vessel in order to avert the commercial prejudice which attaches to the ongoing arrest of the vessel. In this regard the allegations relating to the employment of additional crew, the risk of loss of employment, and the urgent need to commence operations in order to service the applicant's financial obligations are essentially unchallenged. Such commercial considerations may found grounds for urgent intervention by a court.²

[14] In the Caledon Street Restaurant matter Kroon J, in dealing with the modification of the time periods provided by the Rules, held that,

² Bandle Investments (Pty) Ltd v Registrar of Deeds 2001 (2) SA 2013 (SE)

In the assessment of the validity of a respondent's objection to the procedure adopted by the applicant the following principles are applicable. It is incumbent on the applicant to persuade the court that the non-compliance with the rules and the extent thereof were justified on the grounds of urgency. The intent of the rules is that a modification thereof by the applicant is permissible only in respects and to the extent that it is necessary in the circumstances. The applicant will have to demonstrate sufficient real loss or damage were he to be compelled to rely solely or substantially on the normal procedure. The court is enjoined by rule 6 (12) to dispose of an urgent matter by procedures "which shall as far as practicable be in terms of these rules". That obligation must of necessity be discharged by way of the exercise of a judicial discretion as to the attitude of the court concerning which deviations it will tolerate in a specific case.

[15] I have already pointed to the fact that the applicant in this matter points to real and substantial financial losses in the event that the vessel remains under arrest for any substantial period beyond the end of this month. It is for this reason that it requires determination of the merits of application prior to that eventuality. These considerations in my view, satisfy the requirement that the applicant demonstrate sufficient real loss were it to rely upon adjudication in the ordinary course. Nor is sight to be lost of the fact that the arrest of a vessel involves inherent considerations of urgency.³

[16] I am therefore satisfied that in the particular circumstances of this matter the applicant's modification of the rules relating to the enrollment and hearing of the matter was justified. In the circumstances the plaintiff's objection to the procedure adopted cannot be sustained.

The merits

[17] A party seeking to arrest a vessel *in rem* is required to establish, *inter alia*, that the claim is a "maritime claim" as defined in the Admiralty Act; that the property to be

³ See *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) at 581 where Corbett CJ referred to a dictum of Didcott J in *Katagum Wholesale Commodities Co Ltd v The MV Paz* 1984 (3) SA 261 (N) regarding the consequences of attachment of a vessel.

arrested is maritime property within the meaning of section 3 (5) of the Admiralty Act; that the property is either situated in or is likely to be situated within the jurisdiction of the court; that the property to be arrested is the property against which the claim lies, and that the claimant has no security for its claim.

[18] Section 3 (4) of the Admiralty Act provides that:

Without prejudice to any other remedy that may be available to the claimant or to the rules relating to the joinder of causes of action maritime claim may be enforced by an action *in rem* –

(a) if the claimant has a maritime lien over the property to be arrested; or

(b) if the owner of the property to be arrested would be liable to the claimant in an action *in personam* in respect of the cause of action concern.

[19] A party seeking the arrest or defending an arrest in circumstances where it is sought to set it aside, is required to establish that it has a *prima facie* case on the underlying claim in respect of which the arrest is sought or was obtained. The *onus* is accordingly retained by the arrestor, even in an application for the setting aside of the arrest.⁴ In this regard the arrestor bears the *onus* to persuade the court that each of the grounds upon which the applicant attacks the arrest should fail.⁵

[20] Hare refers to two ‘layers’ of *onus* which apply in the case of an arrest of a vessel. The first concerns the proof on the ordinary civil standards, namely a balance of probability, that the essential requirements to support an arrest or attachment exist. The second is the standard of proof which relates to the claimant’s underlying claim against the defendant vessel. This standard of proof is *prima facie*. In this regard the

⁴ Hofmeyer *Admiralty Jurisdiction, Law and Practice in South Africa* 2nd ed. p.124ff

⁵ Hare, *Shipping Law & Admiralty Jurisdiction in South Africa* 2nd ed. p 132 and the authorities there cited.

claimant is only required to place before the court facts which, if approved, will show an underlying cause of action justiciable in the court.⁶

[21] In Cargo Laden on Board The Thalassini Avgi v MV Dimitris ⁷it was held that:

The requirement of *prima facie* is satisfied where there is evidence which, if accepted, will show a cause of action. The mere fact that such evidence is contradicted would not disentitle the applicant to the remedy. Even where the probabilities are against him, the requirement would still be satisfied. It is only where it is quite clear that he has no action, or cannot succeed, that an attachment should be refused or discharged...”

Plaintiff's contractual claim

[22] The applicant's case is that the plaintiff has no claim against it *in personam* at all. The summons *in rem* is predicated upon a claim in contract for the payment of commission due consequent upon the purchase of the defendant vessel by the applicant. The applicant points out that the claim, as formulated in the summons, is in conflict with assertions made by the plaintiff in correspondence addressed to the erstwhile owner of the vessel, Donahue.

[23] In an email dated 19 January 2018 addressed to Donahue the plaintiff states that it marketed the vessel and in due course introduced the applicant, as purchaser, to Donahue, as the seller. The email continues as follows:

5. Our understanding, and the basis of our agreement, is that the difference between your asking price and the eventual purchase price that we procure for the vessel would be our commission.

⁶ Hare (supra); Hofmeyer p 124 V.20

⁷ 1989 (3) SA 820 (A) at the 831H – 832B

6. As far as it turned out, the vessel, so we understand, was indeed sold to Fisherman Fresh and, in fact, delivered to it *circa* 17 November 2017.

7. Since we introduced our client to you, you have elected to keep us “out of the loop” on the sale of the vessel.

8. Presumably you did so to avoid paying our commission.

...

13. Unless we receive payment from you of our commission by close of business on Monday 22 January 2018, we intend to arrest the vessel in order to secure our claim. We have copied in the new owners of the vessel, so that they may be aware of our intended action. You are forewarned to act accordingly.

[24] No reference is made in this correspondence to any agreement between the plaintiff and the applicant in respect of the payment of commission.

[25] In its letter of demand, addressed to Donahue on 22 January 2018, the following is recorded.

1. Our client entered into an agreement with you in terms of which you would pay our client commission in the event that your vessel, the MV Qavak, is sold to a purchaser introduced to you by our client.

2. The MV Qavak was subsequently sold to a purchaser introduced to you by our client, namely a close corporation, trading as “Fisherman Fresh”.

...

4. It was an express, alternatively implied, term of the agreement that should our client duly perform it would be entitled to be paid a commission calculated as the difference between what your asking price was and the eventual selling price.

5. Alternatively, it was an implied term of the agreement that, in the event of such a sale, our client would be entitled to commission calculated at 5% of the selling price.

[26] The letter then concludes,

Should you fail to pay, we are instructed to arrest of vessel, pending the determination of this dispute.

[27] No letter of demand was addressed to the applicant as the owner of the vessel. Instead the vessel was arrested *in rem* upon the allegations contained in the summons.

[28] In challenging the arrest, the applicant states that the plaintiff has no claim whatsoever against it. Accordingly an essential element for the issue of a warrant of arrest, namely a claim *in personam* against the owner of the vessel, is absent. The applicant furthermore states that while the plaintiff may have a claim against Donahue for payment of commission, no such claim exists against the applicant. The applicant furthermore points to the contract of sale concluded with Donahue in which Donahue confirms liability for payment of commission, albeit to another agent, and indemnifies the applicant from such claims.

[29] In dealing with these allegations, the plaintiff has shifted its ground. In its answering affidavit it asserts that it has two claims against the applicant, namely a contractual claim and an alternative claim based on an alleged interference in a contractual relationship as existed between the plaintiff and Donahue. It should be mentioned at this juncture that during the course of argument the plaintiff abandoned its “claim” for payment of commission as formulated in the summons, indicating that it would in due course seek an amendment to reflect the cause or causes of action adumbrated in its answering affidavit. In argument it was submitted that it was entitled to rely upon any ground to justify the arrest of the vessel, notwithstanding that such ground was not that upon which the arrest was procured.⁸

[30] The contractual claim, the plaintiff asserts, is one founded on the applicant’s breach of “contractual obligations owed by it, as principal, to Plaintiff, as broker”. The contract is alleged to have arisen in consequence of the conduct of the parties. The plaintiff accordingly disavows reliance upon an express agreement.

⁸ Transol Bunker BV v MV Andrico Unity and others; Grecian Mar SRL v M V Andrico Unity and others 1987 (3) SA 794 (C) at 799F

[31] The conduct upon which the plaintiff relies includes the fact that plaintiff listed the vessel on his website for sale; the applicant contacting him as a broker to enquire whether the vessel is for sale; and, following correspondence with Donahue, the submission of a letter of intent by the applicant via the plaintiff's offices reflecting an intent to purchase the vessel upon certain conditions. Based on this the plaintiff alleges that he was, throughout this period, acting as a broker to the knowledge of both plaintiff and the applicant. From this knowledge is to be inferred an agreement in relation to specific terms of the brokerage agreement.

[32] The plaintiff's answering affidavit proceeds as follows:

96. Furthermore, as stated above, the Corporation and Donahue Fishing agreed that they would purchase the vessel through Plaintiff, that they would not employ other brokers to conclude the sale, and they would not do anything which may frustrate plaintiff's opportunity to earn commission.

97. Alternatively, and at the very least, Plaintiff concluded a brokerage agreement with the Corporation in terms of which the Corporation would have the duties described above.

98. In concluding the Sale Agreement, the corporation and Donahue Fishing breached the agreement in that:

98.1 they failed to use Plaintiff as a broker;

98.2 they employed another broker; and

98.3 thereby they denied plaintiff an opportunity to earn the commission which had been agreed.

99. As a result of the breach as aforesaid, Plaintiff has suffered damages in the amount of the commission which would have been earned if the vessel had been purchased through Plaintiff.

100. Both the Corporation and Donahue Fishing are liable to plaintiff.

101. Based on my experience in the industry I consider that 10% commission would constitute a fair and reasonable reward for the work which Plaintiff did in bringing the Corporation and Donahue Fishing together.

102. I consider further that Plaintiff would have been able to conclude a sale agreement between the Corporation and Donahue Fishing for at least the same amount as was achieved in the Sale Agreement, namely €620,000.

103. The fair and reasonable commission would therefore have been €62,000 and this is accordingly the amount of damages suffered by Plaintiff as a result of the Corporation's breach.

- [33] It will be immediately apparent from these allegations that the plaintiff contends for a tacit contract, which includes both tacit terms and implied terms in the sense that the terms are implied by operation of law to the alleged tacit agreement. It will also be apparent that the amount of commission payable is founded upon an allegation of what would be fair and reasonable rather than what may have been expressly or impliedly agreed.
- [34] Also immediately apparent from these allegations is the fact that there is no allegation, in the context of this tacit agreement, as to the party responsible for the payment of commission. It appears however that the commission would be payable by the seller, hence the formulation of the claim against the applicant as being a damages claim.
- [35] During the course of argument the question arose as to the nature of the legal relationship that may arise, in the context of a tacit contract, between a broker and a potential purchaser. It was to this question that the parties addressed themselves in the supplementary heads of argument.
- [36] In addressing this issue Mr Cooke, for the plaintiff, submitted that the authorisation of a broker by the principal will usually come about by virtue of the contract between the principal and the agent. The plaintiff's case, he submitted, may thus be summarised as follows: the plaintiff acted as a broker in connection with the sale of the vessel; a broker is an agent of the buyer and the seller; in acting as a broker the plaintiff was thus authorised by the buyer to represent it; and, the authorisation of the plaintiff by the applicant therefore occurred by means of a contract. This syllogism however, begs the question as to what was agreed either tacitly or by necessary implication.

[37] It was argued that an agency relationship comes into being when the broker is employed or when the party concerned becomes aware of the fact that he is dealing with the broker. The argument was advanced that since the plaintiff was the agent of both Donahue and the applicant that this agency relationship created certain duties owed by the principals to the plaintiff. These duties were:

To pay a fair and reasonable commission if a sale agreement was concluded between the principles; and

To transact with each other through the plaintiff, not to employ other brokers to conclude the sale between them and not to do anything which may frustrate the plaintiff's opportunity to earn the commission...

[38] It was argued that these terms are necessary to give effect to the agreement and that such terms are to be implied by operation of law. Failing the imposition of such terms by law, the plaintiff submitted that it is reasonable to infer from the conduct of the parties that the parties intended to and did contract on the these terms.

[39] As I understand, the case advanced by the plaintiff it is that the conduct of each of the parties gave rise to an agreement tacitly concluded between all three of the parties. I do not understand it to be suggested that a tacit contract arose as between plaintiff and Donahue on the one hand and another separate tacit agreement as between plaintiff and the applicant. The passages of the affidavit cited above indicate that the plaintiff contends for a brokerage agreement binding between each party.

[40] If this is so then an immediate conceptual difficulty arises which bears upon the question whether the plaintiff's contractual claim is *prima facie* established. It is of course trite that there is no difference between express or tacit agreements. The

difference lies in the method of proof of the agreement.⁹ In the case of a tacit agreement its existence and its terms are established by inference drawn from the conduct of the parties. Ordinarily the relevant conduct will be that of the contracting parties. In this instance it appears that the plaintiff relies upon the individual conduct of parties who, on the plaintiff's version, acted separately from one another in concluding the agreement with the plaintiff.

[41] I am not persuaded that such circumstances can give rise to a single agreement to which all three are party. It is difficult to conceive how the separate individual conduct of one actor can found an inference of agreement on the part of another actor. At best the conduct of separate actors may give rise to separate and distinct tacit agreements, the terms of which would be inferred from the conduct of the particular actor with whom it is alleged a tacit agreement was concluded.

[42] The alternative contention advanced by the plaintiff, is that a brokerage agreement was concluded tacitly between the plaintiff and the applicant. Before dealing with the terms of this agreement and whether they are established, it bears mentioning that the allegation relating to the tacit agreement with Donahue (and the applicant for that matter), namely that it was tacitly agreed that the plaintiff would be entitled to "fair and reasonable commission" is inconsistent with the terms of the letters of demand (which are not denied) addressed to Donahue. In the letter of demand, it will be recalled, the plaintiff contended for an express, alternatively implied agreement that it would be "entitled to be paid commission calculated as the difference between what your asking price was and the eventual selling price", alternatively that it was an implied term of

⁹ Christie, Law of Contract in South Africa 5th ed. p.82

the agreement that the plaintiff would be entitled to commission calculated at 5% of the selling price.¹⁰

[43] The essential question to be answered in relation to the plaintiff's claim as formulated is whether the evidence put up by the plaintiff to establish its *prima facie* case against the applicant, founded on contract, consists of allegations of fact which if accepted will found a cause of action. The evidence should of course, consist of facts and not mere assertions. It is only when the assertion amounts to an inference which may reasonably be drawn from the facts alleged that it can have any relevance.¹¹

[44] Mr Cooke argued that at common law a broker is regarded as the agent of both the seller and the buyer. He relied, for this, on the judgment of Wessels J in Benoni Produce & Coal Co td v Gundelfinger¹² where the learned judge said,

Now a broker according to our law is a middleman or intermediary whose office is to negotiate between two parties until they are at idem as regards the terms upon which they are prepared to buy and sell. (Faber's Lexicon *sub voce* Froxeneta; Voet 17.1.4.) 'He is as it were agent for both one and the other to negotiate the commerce and affair in which he concerns himself.' (Domat *Droit Civil* 1.17.1.1.)

[45] This statement of the nature and character of the office of a broker is in itself uncontroversial. As an expression of the true nature of the relationship of representation in agency and what that entails, it cannot, as has been suggested by Dendy, be taken at face value.¹³ This is so because the act of authorisation of the broker and the mandate thereby given may differ as between the buyer and seller.

¹⁰ In its answer affidavit it is now suggested that the fair and reasonable commission would be 10% of the selling price.

¹¹ Hülse-Reutter and Others v Gödde 2001 (4) SA 1336 (SCA)

¹² 1918 TPD 453 at 458

¹³ LAWSA Vol. 1 (Agency and Representation) par 132

The act of authorisation of the broker arises by contract¹⁴. The terms of that contract will determine what obligations are imposed upon the respective parties to the agreement. The judgments of Wessels J and Curlewis J in the Benoni Produce matter recognised that the relationship between the broker and each of the parties is one of agency. The authority of the agent to represent the principal is therefore an instance of the principle of representation. It should be remembered that the authority of a broker may extend to the conclusion of an agreement on behalf of the principal. That is of course not the type of brokerage for which the plaintiff contends. What is here asserted is akin to a selling or property agent where the broker introduces a buyer to the seller; facilitates the negotiation of the agreement of sale and thereby earns payment of remuneration of commission based on his / her employment as agent for the seller.

[46] So much for the nature of the relationship which is established in a brokerage arrangement - but what of the particular obligations which are imposed thereby? As I understood it Mr Cooke sought to suggest that the entitlement to earn commission is a necessary instance of the relationship of broker to principal and that it is to be an implied term of such agency.

[47] The further argument was that it is either to be inferred from conduct (in the case of a tacit agreement of brokerage) or implied as a matter of law, that upon the relationship of brokerage being established the parties agree not to make use of the services of any other broker and furthermore agree not to do anything to prevent the broker from earning his /her commission.

¹⁴ Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd 1984 (3) SA 155 (A)

[48] The first issue, i.e. entitlement to remuneration, may be easily disposed of. A broker / agent's entitlement to remuneration as mandatory is dependent upon agreement, either express or tacit with the party who undertakes such obligation. It is not implied by law. The payment of such remuneration is of course dependent upon fulfillment of the terms agreed upon.

[49] In Karol v Fidell the court dealt, on appeal, with an instance where the court *a quo* had found that there was an express agreement between a seller and broker entitling the broker to commission. The court addressed certain aspects of the magistrate's reasoning and found that the magistrate was wrong. The court nevertheless went on to find, on the evidence, that it was established that a tacit agreement had been concluded. For present purposes the following finding, made with reference to earlier authority, is relevant:¹⁵

That plaintiff acted as broker and that he was the effective means of the sale being concluded could not, in the light of these authorities, entitle him to claim a commission. It would still be necessary for him to establish a contract, express or implied, of employment and a promise, express or implied, to pay remuneration.

[50] As to the second issue, namely an alleged 'exclusivity' of mandate, it should be noted that the plaintiff alleges that this term of the agreement is to be inferred from the conduct of the parties alternatively to be implied. The conduct upon which the plaintiff relies is no more than that upon which it relies to found the tacit contract. No particular conduct or fact is alleged which would warrant the inference sought to be drawn. As already noted inferences are to be drawn from facts. It is in any event to be doubted that conduct of parties, in the absence of declarations, could sustain an inference of exclusivity of mandate. I need not however make any positive finding in this regard

¹⁵ Karol v Fidell 1948 (4) SA 466 (C) at 470

since the court is at this stage concerned with whether the plaintiff has made out a *prima facie* case against the defendant which would justify the arrest.

[51] In MV Pasquale Della Gatta, MV Filippo Lembo, Imperial Marine Co v Deilemar Compagnia Di Navigazione SPA¹⁶ it was said,

Leaving that aside, two other points fall to be made about the approach to proof of a *prima facie* case. They are that where the applicant asks the court to draw factual inferences from the evidence they must be inferences that can reasonably be drawn from it, even if they need not be the only inferences from that evidence. If they are tenuous or far-fetched the onus is not discharged. Second, the drawing of inferences from facts must be based on proven facts and not matters of speculation. As Lord Wright said in his speech in *Caswell v Powell Duffryn Associated Collieries Ltd*:

‘Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish....But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.’

[52] A careful reading of the plaintiff’s papers indicates that no facts or assertions are advanced upon which an inference of a tacit agreement of exclusivity can be sustained.

[53] That leaves the contention that the term is to be implied by operation of law. It should be emphasised here that the “exclusivity” upon which plaintiff relies applies to both seller and buyer even in circumstances where no express mandate to sell has been given to the broker by the seller. I was not referred to any authority pointing to implied exclusivity of mandate by law.

[54] This is not surprising since the weight of authority dealing with the nature of the business of a broker lays emphasis upon the fact that the broker is an intermediary – whose function is to negotiate and make bargains between parties. The broker’s role

¹⁶ 2012 (1) SA 58 (SCA) at par 24

as agent to both parties arises because of the process of facilitating the negotiation as intermediary. His / her authority or mandate is however dependent upon the agreement concluded with each of the principals.¹⁷ The plaintiff's submission was that upon engagement in the process of facilitation via a broker the parties implicitly agreed that no other broker would be employed in relation to the business between the parties.

[55] In South African Forestry Co Ltd v York Timbers Ltd ¹⁸ Brand JA set out the approach to implied terms as follows:

Unlike tacit terms, which are based on the inferred intention of the parties, implied terms are imported into contracts by law from without. Although a number of implied terms have evolved in the course of development of our contract law, there is no *numerus clausus* of implied terms and the courts have the inherent power to develop new implied terms. Our court's approach in deciding whether a particular term should be implied provides an illustration of the creative and informative function performed by abstract values such as good faith and fairness in our law of contract. Indeed, our courts have recognised explicitly that their powers of complementing or restricting the obligations of parties to a contract by implying terms should be exercised in accordance with the requirements of justice, reasonableness, fairness and good faith (see, eg, *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) at 651C-652G; *A Becker & Co (Pty) Ltd v Becker and Others* 1981 (3) SA 406 (A) at 471F-420A; *Ex Parte Sapan Trading (Pty) Ltd* 1995 (1) SA 218 (W) at 226I-227G).

Once an implied term has been recognised, however, it is incorporated into all contracts, if it is of general application, or into contracts of a specific class, unless it is specifically excluded by the parties (see, eg, *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531D-H). It follows, in my view, that a term cannot be implied merely because it is reasonable or to promote fairness and justice between the

¹⁷ Jacobs Levitatz And Braude Kroonstad Roller Mills 1921 OPD 38 AT 40; Cf. Benoni Produce (supra)

¹⁸ 2005 (3) SA 323 (SCA) at par 28

parties in a particular case. It can be implied only if it is considered to be good law in general.

[56] In this instance the plaintiff contends for the term on the basis of what would be fair and reasonable between the parties. We are here concerned not with determining whether such exclusivity should be implied in contracts of brokerage but with whether the plaintiff has established, *prima facie*, a cause of action against the defendant vessel (or applicant for that matter) founded on contract and which entitles it to arrest the defendant vessel.

[57] The discussion of the nature of the brokerage relationship set out above does not, in my view, favour a finding that such term as is contended for by the plaintiff is likely to be implied. Indeed the authorities point in the opposite direction emphasizing as they do that the particular terms of the mandate conferred by the parties upon the broker are matters to be regulated by the agreement concluded by them. Furthermore, it should be noted that the principle is well recognised in contracts such as this that where two or more brokers are involved, for example in the purchase and sale of property, the entitlement to remuneration accrues to the first broker who introduced the parties to the bargain.¹⁹

¹⁹ See Hamlin v Dunn & Co 1908 NLR 731 at 738. This judgment is also authority for the proposition that it is an implied term that the seller is liable for payment of remuneration to the broker. At 734, the court held:

I understand that the practice of brokers is to bring buyers and sellers together, to ascertain what people want to buy and what people wish to sell; when they know there is a buyer in the market they go around to get quotations and try and bring buyer and seller together. In this they perform a very important duty. I understand that the rule is that when a sale is effected, the *seller* pays the commission. Now, this custom has so universally obtained that it may be said to have hardened into a rule of law, and I do not think that a Court ought to shut its eyes to a custom which is so well known, although not pleaded. We are not required to assume entire ignorance of commercial matters. If there is such a custom I think it was quite unnecessary to plead it. If, on the other hand, a plaintiff sought to recover commission from a *buyer*, then I think it would be necessary for him to prove the exception to the rule, or that there was a special contract between the buyer and the broker whereby the buyer was to pay the commission.

[58] In my view the plaintiff has failed to make out a *prima facie* case for a tacit or implied term in the tacit contract alleged to have been concluded between plaintiff and the applicant in terms of which the applicant, as buyer, was precluded from dealing with Donohue other than via plaintiff as broker. It follows therefore that I am not satisfied that the plaintiff has established on a *prima facie* basis its claim founded upon the alleged breach of a contractual term.

Plaintiff's delictual claim

[59] That brings me to the alternative claim as formulated in the plaintiff's answering affidavit. This claim is a delictual claim for damages caused by the applicant's alleged wrongful and unlawful breach of a legal duty owed to the plaintiff. The plaintiff alleges that the breach took the form of applicant's culpable interference in a contractual relationship which existed between plaintiff and Donahue, in terms of which plaintiff would have been entitled to payment of commission upon the conclusion of a sale agreement for the vessel.

[60] The first question that arises in regard to this claim is whether it is a 'maritime claim' as envisaged by the Admiralty Act and as required by s 3 (4) of that Act.

[61] In asserting that the claim is indeed a maritime claim it was submitted that the claim arises out of or relates to an agreement for the sale of a ship (s 1 (1) (c) of the Act) and / or the remuneration of a person appointed to act as a broker in respect of a sale agreement relating to a ship (s 1 (p) (ii) of the Act).

[62] The plaintiff's claim is one against a third party who is alleged to have 'unlawfully interfered' in a contractual relationship between it and Donahue. This latter contract

was, it is alleged, a contract regulating the remuneration of plaintiff as broker in the sale of a vessel, the defendant, of which Donahue was the erstwhile owner. The delictual claim therefore, it was submitted, “relates to” a matter which is defined to be a maritime claim. On this basis the plaintiff’s claim is said to be a ‘maritime claim’.

[63] The term ‘relates to’ as employed in the introductory portion of s 1(1) of the Admiralty Act has been considered in numerous matters. In MAK Mediterranee SARL v The Fund Constituting the Proceeds of the Judicial Sale of the MC Thunder (S D Arch, Interested Party)²⁰ Scott J (as he then was) stated that:

The expressions 'arising out of' and 'relating to', like the expression 'in respect of', which is used repeatedly in s 11(4)(c), and the various other expressions used in s 1(1) in its original form, such as 'in the nature of' and 'in regard to', are all expressions not having a very definite meaning and in each case the meaning to be attributed to them, I think, must depend largely on the context in which they are used. In *White and Others v Natal Provincial Administration* 1955 (3) SA 82 (N) Broome JP construed, for instance, the expression 'in respect of' in the context in which it was there used as indicating 'a loose or indirect relationship', which he thought was also what was indicated by the expressions 'in relation to' or 'relating to'. The expression 'in respect of' was described by Beyers JA in *Montesse Township and Investment Corporation (Pty) Ltd and Another v Gouws NO and Another* 1965 (4) SA 373 (A) at 384B-C, citing with approval Selke J in *McDermott and Others v Durban Transport Management Board and Others* 1955 (2) SA 191 (N) at 196, as 'an expression of very wide, and not very definite, meaning', and one which

'was potentially the equivalent of such expressions as "in connection with", "arising out of", "with reference to", "in relation to" and "touching and concerning"'.

The same expression has also been construed narrowly to mean 'having some direct or causal relationship with' (see *Commissioner for Inland Revenue v Crown Mines Ltd* 1923 AD 121 at 125; *De Villiers v Commissioner for Inland Revenue* 1929 AD 227 at 229; *McNeil v Commissioner for Inland Revenue* 1958 (3) SA 375 (D) at 377; see also *Commissioner for Inland Revenue v Butcher Bros (Pty) Ltd* 1945 AD 301 at 320). In *Continental Illinois National Bank and Trust Co of Chicago v Greek Seamen's Pension Fund* 1989 (2) SA 515 (D) Thirion J, after referring to the dictionary meanings of certain of the different expressions used in s 1(1) in its original form to connect the various claims with their subject-matter (which meanings were given as being the equivalent of other expressions also used in the section), concluded at 528 that

'(w)hile the expressions discussed above may have different shades of meaning depending on the context in which they are used, it would seem to me that in the definition of 'maritime claim' in s 1(1) (ii) of the Act they are used interchangeably'.

²⁰ 1994 (3) SA 599 (C)

Similarly, Page J, in *Peros v Rose* 1990 (1) SA 420 (N) at 425, was unable to discern any logical pattern which would explain the difference in the expressions used in s 1(1) (ii) and accepted that they were

'not intended to convey any significant difference in the type of relationship sought to be described'.

It seems to me that expressions of the kind referred to above are not readily capable of precise definitions, and have meanings which by their very nature are less than definite. When it becomes necessary, therefore, to determine the limits of the relationships which they may be employed to describe, particularly in what may be considered as borderline cases, it is inevitable, I think, that particular regard will have to be had to the context in which they are used in the statutory provision in question as well as any other indications, whether in the statutes or otherwise, which may present themselves.

[64] Lopes J, in MFV El Shaddai, Oxacelay and Another v MFV El Shaddai And Others ²¹

held that the question to be “considered is whether the claim is such that its relationship with 'marine or maritime' matters is sufficiently close that it is necessary for it to be heard as a maritime claim in this court.”

[65] Van der Linde J, in Kuehne & Nagel (Pty) Ltd v Moncada Energy Group SRL ²²

approached the question on the basis that “there has to be at least a legally relevant connection between, on the one hand, the claim being made and, on the other hand, the object to which the claim is required to relate for purposes of the definition of “*maritime claim*”.” The learned judge explained that by ‘legally relevant connection’ he meant that the claim and the object “must be connected in such a way that either in procedural or substantive law the determination of the one could be influenced, legally, by the determination of the other”.²³

[66] The ‘object to which the claim is required to relate’ for present purposes is the agreement regulating the remuneration of the plaintiff, as broker, in the sale of the vessel. For the purposes of the plaintiff’s claim against the applicant, it seems to me,

²¹ 2015 (3) SA 55 (KZD) at par 18

²² [2016] ZAGPJHC 26 (19 February 2016) at par 30

²³ *Ibid* at par 30.

the plaintiff will necessarily have to establish that it would have earned commission but for the alleged unlawful interference. The substantive determination of damages in its claim against the applicant will be determined with reference to its maritime claim as against Donohue. This being so, I consider that the plaintiff's alternative delictual claim is 'sufficiently closely connected' to a maritime matter. Put differently, I consider that there is a 'legally relevant connection' between the claim, as formulated, and the object to which it relates, namely the remuneration of a broker as provided in an agreement for the sale of a ship.

- [67] It follows that I am satisfied that the alternative claim does constitute a 'maritime claim'. That, however, is not the end of the matter. It remains necessary to determine whether the claim is *prima facie* established. It was argued by applicant's counsel that the requisites for establishing a delictual claim for alleged unlawful interference in a contractual relationship are not sufficiently pleaded in its answering affidavit.
- [68] The allegations made by the plaintiff are the following: that the applicant knew that plaintiff had introduced the parties; that the plaintiff knew that plaintiff would earn a commission; that inasmuch as the applicant concluded an agreement through another broker, the applicant 'acted in a dishonest and unfair manner'. The plaintiff further alleges that the applicant had a legal duty to respect the plaintiff's right to its goodwill. The plaintiff further states that it appears that the applicant "intentionally assisted and supported" Donahue in breaching its agreement with the plaintiff.
- [69] These allegations are set out in the barest of terms. They constitute, for the most part, assertions or inferences drawn from the fact that an agreement was concluded between the applicant and Donohue via another broker; and from the alleged failure of both Donohue and the applicant to advise the plaintiff that the sale of the vessel had been concluded via another broker.

[70] As stated by Hofmeyer ²⁴

It is only when an assertion amounts to an inference which may reasonably be drawn from the facts alleged that it can have any relevance. Although some latitude may be allowed, the ordinary principles involved in reasoning by inference cannot be ignored in assessing whether or not a *prima facie* case has been established. In the ordinary course in a civil case the court will consider the probabilities and will enquire whether the inference sought to be drawn from the facts is one which, by balancing probabilities, is the one which is the most natural or acceptable one. While there need not be rigid compliance with this standard, the inference sought to be drawn must at least be one which may reasonably be drawn from the facts alleged. If the position were otherwise, the requirement of a *prima facie* case would be rendered nugatory.

[71] The applicant deals with these allegations in its reply. It denies any collusion and furthermore explains the process by which the agreement of sale came to be concluded. In the context of establishing whether the plaintiff has made out a *prima facie* case it is unclear to what extent regard ought to be had to contradicting allegations made by the defendant vessel (in an attachment matter) of the defendant applicant in the present matter.²⁵ Whatever the position may be, it seems to me that the averments made by the applicant cannot be ignored. Certainly not to the extent that they cast light on whether the inference upon which the plaintiff relies may reasonably be drawn.

[72] In relation to the alleged loss suffered by the plaintiff – a necessary element to establish its cause of action – the plaintiff admits that it has a contractual claim against Donahue. It says however, that it is unable to enforce the claim in this jurisdiction and that “it appears that Donahue Fishing does not have any assets against which a judgment could be executed”.

²⁴ Hofmeyer (ibid) at p.125

²⁵ See the discussion of the authorities in Hofmeyer (supra) at 126, V.25

- [73] There is no factual foundation to this latter assertion. Indeed it appears to be wholly inconsistent with facts which are common cause, namely that Donahue received payment of an amount of €620 000 for the defendant vessel.
- [74] The fact that the plaintiff's contractual claim is not enforceable in this jurisdiction does not of course, mean that its claim is unenforceable. It is entitled in law to pursue Donahue in the jurisdiction where the brokerage agreement was concluded.
- [75] It is an essential requirement to found a delictual claim that the claimant should allege (and ultimately prove) that it has suffered a loss caused by the delinquent defendant. In this instance all that is in effect alleged is that the loss is to be quantified on the basis of the reasonable and fair commission that would have been earned. That is not an alleged loss actually suffered. It only becomes a loss suffered in consequence of an alleged unlawful interference with the contract if that which would have been earned is contractually or otherwise irrecoverable from the contracting party whose obligation it was to make payment.
- [76] In the light of this I am unable to conclude that the requisites for the alternative delictual claim are *prima facie* established. An essential requirement for an arrest, in terms of s 3 (4) of the Admiralty Act is lacking. It would follow that the warrant of arrest authorised by the Registrar falls to be set aside as does the summons.
- [77] It remains necessary to consider briefly a further basis upon which applicant's counsel contended for the setting aside of the warrant.
- [78] The warrant for the arrest of the defendant vessel was obtained *ex parte*. As is required in terms of the Admiralty Rules, plaintiff's attorney issued a certificate in

which was confirmed that the plaintiff has a maritime claim *in rem* against the vessel and, furthermore, that no reason exists to refer the matter to the duty judge.

[79] It must be recalled that the basis of the claim in the summons *in rem* was that the plaintiff and the defendant vessel had concluded an agreement and that commission was payable to the plaintiff. A party is of course entitled to institute a claim *in rem* if it has a claim in personam against the owner of a vessel and where the claim is against the ship.

[80] The formulation of the claim against the defendant vessel, as we now know, bears little or no resemblance to the claims that were advanced at the stage that the applicant sought to set aside the arrest. The claims advanced before this court also do not appear to be 'claims against the ship'. It is to be doubted, on this basis too that the arrest was in terms of s 3 (4). I need not say anything further in this regard though. The object of outlining the significant disparity between that which was formulated as a claim at the stage that the arrest was sought *ex parte* and the claims as formulated thereafter, is to highlight the duty which rests upon a party to make full and proper disclosure.

[81] In MV Rizcun Trader (4), MV Rizcun Trader v Manley Appeldore Shipping Ltd ²⁶ Van Reenen J held,

In the event of my understanding of the said *dicta* being erroneous, it in any event appears to me to be axiomatic that the question whether the *uberrima fides* rule has been breached must be decided on the basis of the information before the Court when the *ex parte* order was granted, judged against facts that have subsequently come to light.

As by the very nature thereof an *ex parte* application has to be decided on a one-sided version of the events and, more particularly, as the evidentiary criterion is *prima facie* proof, the *uberrima fides* rule places a duty on a litigant who approaches the Court in an application of that nature to disclose every circumstance which might influence the Court in

²⁶ 2000 (3) SA 776 (C) at 793H-794A

deciding to grant or withhold relief. (See the cases referred to by Erasmus *et al Superior Court Practice* at B1 - 42 footnote 1; Van Winsen *et al The Civil Practice of the Supreme Court of South Africa* 4th ed at 367 footnote 124; Harms *Civil Procedure in the Supreme Court* at G1 footnote 10.)

Applications for the arrest of vessels as security are as a matter of practice brought *ex parte* and almost invariably as a matter of urgency before duty Judges with increasingly heavy workloads. The instant matter appears not to have been an exception as, according to a handwritten note on the Court file, the arrest order was granted by Thring J at 21:50. E M Grosskopf JA in *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 379F - G adversely commented on the making of orders in such circumstances, particularly if the relief sought is based on largely untested hearsay. It appears to me to be axiomatic that where orders are sought in circumstances such as those set out above the need on the part of deponents to adhere to the requirements of the *uberrima fides* rule is more pronounced.

Le Roux J in *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 349A - B extracted the following principles applicable to the *uberrima fides* rule from the relevant authorities:

'(1) (I)n *ex parte* applications all material facts must be disclosed which might influence a Court in coming to a decision;

(2) the non-disclosure or suppression of facts need not be wilful or *mala fide* to incur the penalty of rescission [ie of the order obtained *ex parte*]; and

(3) the Court, apprised of the true facts, has a discretion to set aside the former order or to preserve it.'

[82] These remarks apply with equal force in relation to arrest *ex parte* by issue of warrant by the Registrar. Given what is now known, namely that the plaintiff's claim is based upon either a contractual or delictual claim against the owner of the ship, it seems to me that the plaintiff or its representatives failed to make full and proper disclosure of material facts. Had that disclosure been made or if the claim had been formulated in a manner consistent with the claims now advanced, it is likely that the matter would have been referred to the duty judge. In that event, various aspects of the claim could have been considered. It hardly bears repeating that the arrest of a vessel carries with it potentially significant consequences.

[83] This court is vested with a discretion whether or not to discharge the order in the light of a failure to disclose material facts. In my view this is an instance where the

exercise of such discretion may well have been warranted. For the reasons which I have set out above it is however not necessary to reach this issue.

[84] I therefore make the following order:

1. The defendant vessel is released forthwith from its arrest and attachment pursuant to the Warrant of Arrest issued in favour of the Plaintiff by the Registrar of this Court on 26 January 2018;
2. The Summons issued by the Plaintiff is set aside as being of no force and effect due to non-compliance with the peremptory provisions of Section 3 (4) of the Admiralty Jurisdiction Act, Act 105 of 1983.
3. The Plaintiff is ordered to pay the Applicant / Defendant's costs of the application.

G. G. GOOSEN

JUDGE OF THE HIGH COURT

Appearances: For the Applicant / Defendant

Adv. R. G. Buchanan SC

Instructed by Greyvensteins

For the Plaintiff

Adv. D. Cooke

Instructed by Thomson Wilks

C/o Jacques Du Preez Attorneys