

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: A04/2022

In the matter between:

BORNE LOGISTICS CC

Applicant

and

ZVOIMPEX a.s

Respondent/Plaintiff

(Trading as Valasaha a.s)

THE “FREIGHT” ADVANCED TO BORNE LOGISTICS CC

Defendant

and held at FIRST NATIONAL BANK, 167 FLORIDA ROAD,
MORNINGSIDE, PAID INTO ACCOUNT NUMBER [....].

ORDER

- (a) It is held that the plaintiff's claim is not a maritime claim as defined in the Act;
- (b) The registrar is directed to allocate a case number to the matter in the ordinary civil jurisdiction of this court, and the plaintiff is given leave to amend its summons in accordance with the Uniform Rules;
- (c) The arrest of the funds in the bank account referred to in the warrant of arrest is set aside;
- (d) The respondent is ordered to pay the costs of the application.

JUDGMENT

Delivered on: 14 February 2022

Ploos van Amstel J

[1] The applicant in this matter is Borne Logistics CC. It claims to be the owner of funds in a bank account which have been arrested by the respondent in the institution of an action *in rem*. It disputes that the claim made by the respondent is a maritime claim as defined in the Admiralty Jurisdiction Regulation Act 105 of 1983 ('the Act') and seeks the setting aside of the arrest.

[2] The respondent is Zvoimpex a.s., a company whose principal place of business is in Slovakia. It issued an admiralty summons *in rem* in this court, exercising its admiralty jurisdiction, in which the defendant is cited as 'The Freight Advanced to Borne Logistics CC and held at First National Bank, 267 Florida Road, Morningside, paid into bank account number [...].'. The warrant of arrest *in rem* refers to 'the freight being the defendant, in the amount of \$180 000...situated in or held at the First National Bank account number [...].'. The return of service records that pursuant to the warrant of arrest the sheriff had arrested 'All funds as per warrant of arrest currently held in account no [...]'.

[3] A number of issues arose in the papers and during argument. These included whether the plaintiff's claim is a maritime claim; whether the funds were capable of being arrested *in rem*; and whether the arrest can stand as a security arrest for an action *in personam* if there is no valid action *in rem*.

[4] I deal firstly with the nature of the claim. If it is not a maritime claim as defined then the other issues will fall away and the action must proceed in the ordinary civil jurisdiction of this court.

[5] The claim arose out of written agreements for the sale of timber logs to the respondent. Copies of the agreements are annexed to the summons. They were CIF contracts, with delivery to take place in the ports of Shanghai and Nansha in China. The first contract was for the sale of 3000 cubic meter of African Pine at a unit price of USD 129 per cubic meter, for a total price of USD 387 000; the second contract was for the sale of 5 000 cubic meter at a unit price of USD 138 per cubic meter, for a total price of USD 690 000; and the third contract for the sale of 1223 cubic meter at a unit price of USD 148 per cubic meter, for a total price of USD 181 004. All three contracts provided for the payment of a deposit and the balance against the delivery of copies of the shipping documents.

[6] The respondent's case is that it has made a number of payments to Borne Logistics in terms of the first two agreements, and that some of the timber was

delivered to it in partial fulfilment of the contracts. It says Borne Logistics however, in breach of its obligations, failed to deliver the rest of the timber, in consequence of which it cancelled the contracts and wants the money back in respect of which it has not received timber.

[7] Borne Logistics says the respondent's claim is for restitution in terms of a contract of sale, which is not a maritime claim. The respondent says a part of what it paid constituted freight, and to that extent its claim is a maritime claim as defined.

[8] If a contract of sale is on so-called CIF terms¹ the price includes in a lump sum the cost of the goods and the insurance and freight to the named destination. The seller is required at his own expense and risk to put the goods into the possession of a carrier at the port for shipment and obtain a negotiable bill of lading covering the entire transportation to the named destination; load the goods and obtain a receipt from the carrier showing that the freight has been paid or provided for; obtain a policy or certificate of insurance; and prepare and forward the documents required to effect shipment and comply with the contract.² The contracts relating to carriage, freight and insurance are concluded between the seller and the carrier and insurer respectively. The buyer is not a party to those contracts.

[9] The payments made by the respondent to Borne Logistics were part payments in respect of the purchase price of the timber. There was no obligation on the respondent to pay for the freight. Nor was there an obligation on it to pay the insurance premium. The fact that the purchase price included the expense that the seller had to incur in respect of the freight and insurance does not change that.

[10] Counsel for the respondent submitted that the claim falls under the definition of maritime claim in s1(1)(h) of the Act, which refers to any claim for, arising out of or relating to the carriage of goods in a ship, or any agreement for or relating to such carriage. There is no merit in this submission. The respondent's claim arises out of and relates to the purchase by it of timber. The carriage of the timber in a ship, and the agreement for such carriage, was a matter between the seller and the carrier.

[11] The submission that the claim could fall under subsection (i) is misplaced as the claim has nothing to do with a container. Subsection (p) is not applicable as there

¹ Cost, Insurance and Freight.

² *Marine Cargo Claims*, 3rd ed, Tetley, p173; *Lendlease Finance (Pty) Ltd v Corporation De Mercadeo Agricola and Others* 1976 (4) SA 464 (AD) 491-2.

was no involvement by any of the persons mentioned there. Nor is subsection (ee) of any assistance. The claim is for restitution under a contract of sale, which is not a marine or maritime matter.

[12] I conclude that the respondent's claim is not a maritime claim as defined in the Act. This finding seems to me accord with the decisions in *Vidal Armadores SA*³ and *Minesa Energy*⁴ in this division. This finding also makes it unnecessary to consider the other points with regard to the effectiveness of arresting an unquantified part of an indivisible fund in a bank account; and whether the arrest could somehow be taken to be a security arrest for an action *in personam*. Suffice it to say that those points appeared to me to be without substance.

[13] The matter should therefore, in terms of s7(2)(b) of the Act, proceed in the ordinary civil jurisdiction of this court.

[14] The order is as follows:

- (a) It is held that the plaintiff's claim is not a maritime claim as defined in the Act;
- (b) The registrar is directed to allocate a case number to the matter in the ordinary civil jurisdiction of this court, and the plaintiff is given leave to amend its summons in accordance with the Uniform Rules;
- (c) The arrest of the funds in the bank account referred to in the warrant of arrest is set aside;
- (d) The respondent is ordered to pay the costs of the application.

Ploos van Amstel J

Appearances:

For the Applicant	:	S Anderton
Instructed by	:	Denver & Darren Attorneys
	:	Durban
For the 4 th & 5 th Respondents	:	A Gevers
Instructed by	:	D J Dickson & Associates
	:	Durban

³ *Vidal Armadores SA (Owner of the MFV Galaecia) v Thalassa Export Co Ltd* 2006 JDR 0379 (D)

⁴ *Minesa Energy (Pty) Ltd v Stinnes International AG* 1988 (3) SA 903 (D)

Date Judgment Reserved : 04 February 2022

Date of Judgment : 14 February 2022

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Defendant

AMENDED ORDER

- (a) It is held that the plaintiff's claim is not a maritime claim as defined in the Act;
- (b) The registrar is directed to allocate a case number to the matter in the ordinary civil jurisdiction of this court, and the plaintiff is given leave to amend its summons in accordance with the Uniform Rules;
- (c) The arrest of the funds in the bank account referred to in the warrant of arrest is set aside;
- (d) The respondent is ordered to pay the costs of the application, including those reserved on 31 January 2022.