



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, DURBAN**
(Exercising its Admiralty Jurisdiction)

CASE NO: A 122/2015

Name of ship: **MV “IVS CRIMSON CREEK”**

In the matter between:

MARUBENI CORPORATION

First Applicant

MMSL PTE LIMITED

Second Applicant

MV “IVS CRIMSON CREEK”

Third Applicant

and

INTERGIS CO. LIMITED

Respondent

Coram: Koen J

Heard: 28 October 2016

Delivered: 11 November 2016

ORDER

- (a) The order granted by this court on 30 December 2015 for the arrest of the MV “IVS Crimson Creek” under Case No. A122/2015 is set aside.

- (b) The letter of undertaking dated 6 January 2016 furnished to Intergis Co. Limited to secure the release of the MV “IVS Crimson Creek” must be returned to the Applicant’s attorneys forthwith;
- (c) The Respondent, Intergis Co. Limited is directed to pay the costs of this Application, which will include the costs previously reserved and the costs of the arrest application.

J U D G M E N T

KOEN J:

Introduction

[1] This is an application to set aside the deemed arrest of the MV “IVS CRIMSON CREEK” at the instance of Intergis Co. Limited (‘Intergis’).

[2] Intergis successfully brought an application (‘the arrest application’) on 30 December 2015 against Marubeni Corporation (‘Marubeni’) as first respondent and the MV “IVS CRIMSON CREEK” as second respondent, for the arrest of the latter. Marubeni subsequently furnished security for the physical release of the MV “IVS CRIMSON CREEK” which remains under deemed arrest in terms of section 3(10)(a)(i) of the Admiralty Jurisdiction Regulation Act No. 105 of 1983, as amended (‘the Act’). Marubeni, MMSLPTE Limited and the MV “IVS CRIMSON CREEK” (collectively referred to as ‘the Applicants’) thereafter applied in the present application on 25 February 2016 for this deemed arrest to be set aside. On 14 October 2016 I also heard an application for the postponement of this application (‘the postponement application’). I dismissed that application with costs. The postponement application retains relevance only insofar as my reasons for the refusal thereof will be dealt with briefly below.

Background

[3] The following chronology of material events is relevant:

- (a) On 8 October 2014, Intergis, as disponent owner, chartered an (at that stage) unidentified vessel to be nominated by Intergis to Marubeni for a single load voyage.
- (b) On 17 April 2015 Intergis as charterers, chartered from United Bolt Carriers International Limitado, Madeira ('UBCI') a vessel 'to be nominated' for a single load voyage with the same load port and discharge ports as in the Intergis/Marubeni charter, to fulfil Intergis's obligations to Marubeni under the voyage charter¹ of 8 October 2014.
- (c) Pursuant to the Intergis/Marubeni charter, Intergis nominated the MV "Great Prosperity" ('the Vessel') to be the carrying vessel in terms of the fixture recap and Clause 56 of the pro-forma charter party.
- (d) Intergis is one in a number of charterers in a charter party chain, which it understands to be as follows:
 - (i) The head owners, Great Prosperity Shipping Inc chartered the vessel to Sinotrans;
 - (ii) Sinotrans sub-chartered the vessel to Biebu Golf Shipping Ltd. ('Biebu Golf');
 - (iii) Beibu Golf sub-chartered the vessel to Hyundai Merchant Marine Co. Ltd. ('Hyundai');
 - (iv) Hyundai sub-chartered the vessel to Fuk Hing Steamship Co. Ltd ('Fuk Hing');

¹ Given that the charter parties are voyage charters rather than time charters, they essentially amount to contracts of freightage, for the carriage of goods, the voyage charterer, in each case, in relation to the disponent owner from whom they chartered the vessel, being in the position of the 'shipper' of the cargo on board the vessel

- (v) Fuk Hing sub-chartered the vessel to Solebay Shipping Limited ('Solebay');
 - (vi) Solebay sub-chartered the vessel to Jaldhi Overseas PTE Ltd; ('Jaldhi');
 - (vii) Jaldhi sub-chartered the vessel to UBCI;
 - (viii) UBCI sub-chartered the vessel to Intergis;
 - (ix) Intergis sub-chartered the vessel to Marubeni.
- (e) In accordance with Marubeni's instructions the vessel proceeded to Uruguay and at Montevideo loaded a cargo of soya beans into holds 1, 3, 4, 5 and 7. In the arrest application Intergis alleges that it 'understands that the cargo loaded in Uruguay comprised nine parcels but that there was a single shipper noted in the bill of lading'. It annexed a 'non-negotiable copy of bill of lading No. 1 issued at Montevideo on 22 June 2015 relating to the cargo shipped at that point' reflecting that the 'cargo was shipped in apparent good order and condition on board the vessel', which became Annexure JLK 7 to the founding affidavit in the arrest application. The vessel also proceeded to Bahia Blanca in Argentina where cargo was loaded into holds 2 and 6.
- (f) The cargo was carried to and discharged at Qingdao, China.
- (g) Upon arrival at the discharge port, as alleged by Intergis in the arrest application, it 'was apparently established by the receivers', Siamen C & D Commodity Trading Co. Limited, that the cargo in holds 1, 3, 4, 5 & 7 was in a discrepant condition allegedly due to moisture migration and self-heating. It is further alleged that a letter of protest was issued stating that discoloured and damaged cargo had been found in cargo hold no. 4. It had apparently been noted that the moisture content of the cargo was "very high" before loading. The cargo shipped from Bahia Blanca in holds 2 and 6 was undamaged.

- (h) The receivers of the cargo allege a total loss of R8 200 metric tons of the cargo (shipped on board the vessel in hold No. 1), depreciation of 50% in respect of damage to 30 000 metric tons carried in holds 3, 4, 5 and 7 of the vessel, a shortage claim of 200 metric tons, a difficult cargo handling fee, and additional expenses.
- (i) Although some security has been furnished by the owner's P & I club (Swedish Club), the claim still remains at 'apparently' USD 9.3 million, exclusive of interest and costs.
- (j) Sinotrans has advanced a claim against Beibu Gulf seeking security. Beibu Gulf in turn placed Hyundai on notice to take over the defence of any claim and provide counter security to their disponent owner. Hyundai in turn gave notice of the claim to Fuk Hing, which in turn placed Solebay on notice. Solebay in turn placed Jaldhi on notice requesting security.
- (k) Intergis arrested the MV "IVS Crimson Creek" as an associated ship to the vessel by virtue of the provisions of sub-section 3(6) and (7) of the Act, in terms of section 5(3) of the Act. The arrest was for the purpose of providing security for the claims that Intergis is advancing in London by way of arbitration proceedings against Marubeni for a declaratory order that, pursuant to the charter party concluded between Intergis and Marubeni on 8 October 2014 in terms of which Intergis chartered the vessel to Marubeni, Marubeni is liable to indemnify Intergis in respect of any liability incurred by Intergis to UBCI pursuant to Intergis's charter of the vessel from UBCI and arising out of the performance of the said charters, and an order compelling Marubeni to so indemnify Intergis.

Legal Requirements for an Arrest

[4] It is trite law that in order to obtain and maintain an arrest under s 5(3) of the Act, an Applicant for the arrest must establish:

- (a) that it has a *prima facie* claim against the owner of the vessel, capable of being enforced by way of an action *in rem* or *in personam*, in the nominated forum;
- (b) that on a balance of probabilities, it has a genuine and reasonable need for security;²
- (c) that on a balance of probabilities, the owner of the arrested vessel is liable to the Applicant, *in personam*, or that the vessel arrested is an associated ship of the ship concerned in terms of the Act.³

[5] The proof of a *prima facie* claim must be adduced in the founding affidavit⁴ but regard may also be had to any facts thereafter up to the time of the hearing of any setting aside of such an arrest.

[6] In *casu*, Marubeni disputes that Intergis has established a *prima facie* claim and that it has established on a balance on probabilities that it has a genuine and reasonable need for security. These will be considered *seriatim*.

A *prima facie* case:

[7] A *prima facie* case is established if evidence is adduced which, if accepted, will establish a valid cause of action in law.⁵

² This is not an express requirement of the Act but has been described as a formulation of Didcott J in *Katagum Wholesale Commodities Co Ltd v The MV Paz* 1984 (3) SA 261 (N) at 270A – see *MV Orient Stride; Asiatic Shipping Services Inc v Elgina Marine Co Ltd* 2009 (1) SA 246 (SCA) at 248G. It is an entrenched requirement in our law.

³ *MV Pasquale Della Gatta; MV Filippo Lembo; Imperial Marine Company v Deiulemar Compagnia Di Navigazione Spa* 2012 (1) SA 58 (SCA).

⁴ *Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) (Pty) Ltd and another* 1980 (1) SA 313 (D).

⁵ G Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa* 2ed at 124.

[8] The cause of action relied upon in respect of the *prima facie* case asserted by Intergis was encapsulated initially in the following statement by the deponent Ms Kaufmann in the arrest application:

‘I accordingly respectfully submit that as a matter of English Law, where dangerous cargo is loaded on board a vessel without the knowledge and consent of the carrier, the ship or voyage charterer is contractually liable, by virtue of an implied indemnity, to indemnify the carrier against all damages and expenses directly or indirectly arising out of or resulting from such shipment. That obligation to indemnify is expressly provided for in section 4(6) of US COGSA (and in the corresponding provision of Canadian and COGWA) referred to in the charter parties.’

[9] The reliance upon an alleged breach of an implied indemnity, or a contractual right to be indemnified by Marubeni was subsequently tacitly, if not expressly, accepted by Intergis, with reference to an expert opinion on English law provided by Mr Akka QC, not to be available to it. Mr Akka opined as follows:

‘It is plain that the relevant claim is not a claim that there is some implied right to an indemnity, but it claimed that the shipper is in breach of contract for shipping a dangerous cargo without giving proper notice...’

[10] Intergis accordingly *prima facie* had to establish that the cargo was dangerous, hence that there was an implied duty on Marubeni to give Intergis notice thereof, and if it did not, that a remedy of claiming damages would be available to it.

[11] In respect of such a claim the deponent to the founding affidavit in the arrest application, with specific reliance to, *inter alia*, a demand addressed to FuK Hing, alleged variously as follows:

- ‘(a) ‘It seems reasonable to conclude that certain (if not all) of the parcels of soya beans loaded at Montevideo constituted cargo which was not fit to withstand the ordinary voyage to China;
- (b) The apparent high moisture content of certain of the parcels of soya bean cargo loaded at Montevideo into cargo holds 1, 3, 4, 5 and 7

had the result that such cargo suffered from inherent vice and, given its ability to cause damage by moisture migration and self-heating to other parcels of cargo loaded in the same holes, would constitute cargo of a “dangerous” nature;

- (c) The fact that one or more of the parcels of soya bean cargo loaded at Montevideo was subject to the excess of moisture content was apparently not apparent to the Master and officers of the MV “Great Prosperity” at the time of loading;
- (d) The issue (is) ... as it is alleged by London solicitors appointed by head charterers (Beibu) that their charterers (Hyundai) were in breach of charter due to the fact that some of the Uruguayan cargo was “dangerous”. Hyundai contends that tendering such cargo for carriage constitutes a breach of charterers’ implied obligation not to tender dangerous cargo;
- (e) English Law imposes an obligation on a shipper or voyage charterer not to ship dangerous cargo without giving notice to the carrier so as to enable the carrier to take suitable precautions to ensure that the goods can be carried without causing damage;
- (f) There is no exhaustive definition of dangerous cargo under English Law. However, it has been held that cargo which by its properties causes damage to the ship or other cargo is “dangerous” (see the *Darya Radhe* [2009] 2 Lloyd’s rep. 175). There is some overlap between the concept of dangerous goods and inherent vice. Under English Law, inherent vice means the unfitness of the goods to withstand the ordinary incidence of the voyage given the degree of care which the ship owner is required by the contract to exercise in relation to the goods (see “the *Rio Sun*” [1985] 1 Lloyd’s rep. 350);
- (g) Any tendency of the goods to heat, discolour, rot or evaporate may all constitute inherent vice...;
- (h) The Applicant is accordingly vested with the contractual right to be indemnified⁶ by the First Respondent, requiring that it hold the applicant harmless in respect of the claim.’

[12] At a preliminary level Marubeni contends that there can be no cause of action until Intergis’s liability, if any, to disponent owners has been ascertained by an award, judgment or reasonable settlement. Mr Akka disagreed with that statement, contending that it falls within the first of the

⁶ More correctly the position is, as also stated by Mr Akka, that it is ‘not uncommon’ for claims of this nature to be referred to as claims for ‘an indemnity’ because ‘although the claim is strictly speaking for damages, the measure of loss claimed is an indemnity against liability to another.’

categories identified by Neil J in *Telfair Shipping Corporation v Inersea Carriers SA* ("the Caroline P")⁷ where the following was said:

‘... it seems to me that it is possible to identify at least three ways in which a person, A, who has become liable to B may be able to obtain redress from C.

The first way is by an action for damages for breach of contract (or warranty). In such a case A will be in a position to claim that the incurring of his liability to B flowed directly from an act of C which constituted a breach of a contract between A and C or of a warranty given by C to A. The damages will be assessed in accordance with *Hadley v Baxendale* (1854) 9 Exch. 341 principles. The cause of action will date from the date of breach.’

The above statement of the law was not debated before me in any detail, probably because other arguments were considered dispositive of the application. I shall, for the purpose of argument and for deciding the application, accept in favour of Intergis that Mr Akka is correct on this score.

[13] The argument pressed specifically by Marubeni was whether the damage to the cargo complained of arose from inherent vice or, because the cargo was ‘dangerous cargo’. Mr *Wragge* SC on behalf of Intergis fairly accepted that the vital issue was whether the cargo loaded at Montevideo in holds 1, 3, 4, 5 and 7 was dangerous and caused damage to other sound cargo. Mr Akka had concluded that it was dangerous cargo shipped without giving proper notice.

[14] In response to Mr Akka’s opinion, Marubeni filed a legal opinion it had obtained from Mr David Goldstone QC, who points out that

- (a) ‘As a matter of English Law it is correct that a cargo which causes damage to other cargo may constitute a dangerous cargo for the purpose of a claim by carrier against the shipper (or charterer) for breach of an obligation not to ship dangerous goods.’
- (b) ‘However it is also clear that as a matter of English Law, the mere shipment of a cargo which suffers from inherent vice is not a breach of duty. An inherent vice refers to goods which are at risk after deterioration or damage during the course of a voyage not because of any external cause (such as an ingress of water via hatch covers or excessive delays) but as a result of their inherent condition or characteristics. He referred to Lord Diplock in *Soya GmbH v White* [1983] 1 Lloyd rep. 122 at 126, defining “inherent vice” as the “risk of

⁷ [1985] 1 WLR 553; [1984] 2 Lloyd’s rep. 466.

deterioration of goods as a result of their natural behaviour in the ordinary course of the contemplated voyage without the intervention of any fortuitous external event or casualty...”

- (c) ‘Where goods suffer damage as a result of their inherent vice, the carrier has a complete defence to any claim by the shipper or consignee’.
- (d) ‘The critical distinction is thus between cargo that is a danger only to itself (mere inherent vice) and cargo which is a danger to other cargo (dangerous goods)...It is only in (the case of dangerous cargo which pose a risk of damage to other goods, or the ship) that the carrier will be exposed to the risk of claims by the owner of such cargo and may then be entitled to pursue a claim against the shipper of the dangerous cargo (or in certain circumstances the consignee...).’
- (e) ‘The key question is thus whether the goods have damaged “other cargo”.’
- (f) ‘...as a matter of English Law, the contract between the shipper and the carrier is evidenced by the bill of lading. See e.g. Scrutton⁸ on Charterparties ...; *Sewell v Burdick* (1884) 10 App. Cas. 74 at 105’.
- (g) ‘... where a single bill of lading is issued in respect of a bulk cargo, the parties to the contract are the shipper and the carrier named in the bill of lading and the contractual cargo is that described in the bill of lading. The fact that the cargo may have been made up from a number of parcels supplied by a variety of physical suppliers is legally irrelevant as the contract evidence by the bill of lading is a single contract of carriage between the shipper and the carrier for the entire cargo described in the bill.’

[15] I did not understand Intergis to take issue with the aforesaid general statement of the legal position in English law. It also coincides with my understanding of the applicable legal principles from the authorities I have been able to consult in the time available to me. The issue to be determined is however whether a sufficient factual basis has been alleged, to establish a *prima facie* case.

⁸ In Scrutton at article 47 the following is said:

‘The bill of lading is not the contract, for that has been made before the bill of lading was signed and delivered, but it is excellent evidence of the terms of the contract, and in the hands of a indorsee is the only evidence. But it is open to the shipper to adduce oral evidence to show that the true terms of the contract are not those contained in the bill of lading, but are to be gathered from the mate’s receipt, web-sites, work-sites, booking notes, e-mails, exchange of telexes, advice-notes freight-notes, undertakings or warranties by the broker, or other agent of the carrier just as formerly they were gathered from shipping cards, placards and handbills announcing the sailing of the ship.’

[16] In considering that question, Goldstone QC states that he has accepted the facts as alleged by Intergis in the founding affidavit in the arrest application and in the answering affidavit of Mr Tucker in the setting aside application, as correct in formulating his conclusions. He concluded from those facts, which represent the version of Intergis, that:

- (a) The cargo shipped under bill of lading No.1 caused damage only to itself (in other words 'inherent vice'). The position would have been different if (for e.g.) that cargo had somehow caused damage to the cargo shipped under bill of lading No 2 in respect of the cargo in holds 2 and 6.
- (b) Intergis's claim (whether put as a claim for damages or a contractual indemnity) raises no issue of dangerous goods. Rather, the case is one of mere inherent vice and hence cannot succeed as a matter of English Law.

[17] The factual assumptions on which Goldstone QC expressed his conclusion include that although the cargo may have been made up of nine separate parcels, there was a single bill of lading in respect of that cargo. He states correctly that whether the cargo shipped under that single bill was made up of nine separate parcels is legally irrelevant, as the contract evidenced by the bill of lading, was a single contract of carriage between the shipper and the carrier for the entire cargo described in that bill.

[18] Intergis however argues that:

- (a) Bill of lading No 1 reflected the 'shipper' as 'LOC Uruguay SA', whereas on the affidavits it is not in dispute that Marubeni was the shipper; hence that this suggests that there were two shippers of the cargo in holds 1, 3, 4, 5 & 7, therefore the possibility that a cargo of one shipper might have damaged that of another, thereby satisfying the dangerous goods requirement, cannot be excluded;

- (b) That there were 9 parcels making up the cargo, thus possibly suggesting that the cargo of one supplier damaged that of another, to satisfy the requirement to make the cargo 'dangerous'.

[19] *Ex facie* bill of lading No. 1, the consignee was 'to order' and the notified party was Xiamens & D Commodity Trading Co. Ltd. The cargo was described as 'Uruguayan soybeans, packing in bulk, clean on board' and as having been stowed into holds 1, 3, 4, 5 & 7. The cargo loaded in those holds therefore could only constitute a danger to itself. The fact that there was also mention of another shipper, is as Mr *Fitzgerald* SC on behalf of Marubeni correctly submitted, speculative and legally irrelevant. The only factual allegation made by Intergis is that all the cargo, including that damaged or which might have caused damage, were the subject of a single bill of lading and to the extent that any of it caused damage, it caused damage to itself not to other goods (or the ship) which would give rise to claims by the owner of such other cargo. There is no suggestion in Intergis' affidavits that what Bill of Lading No 1 evidences, being a single contract of carriage in respect of the cargo in holds 1, 3, 4, 5, and 7, in fact conceals a carriage of that cargo by multiple shippers under separate bills, contrary to the terms of bill of lading No 1.

[20] Intergis remained critical of the contradiction between Marubeni being the admitted shipper but TAC Uruguay SA being effected as the shipper on bill of lading No. 1, stating that this anomaly fell peculiarly within the knowledge of Marubeni, which it was therefore able to explain, but which it failed to clarify, and that an adverse inference fell to be drawn from that failure, at least at the level of a finding that a *prima facie* case had been established. I was referred to what was said in *MT Tigr: Owners of the MT Tigr v Transnet Limited*⁹ with regard to a party in the position of Intergis and whether it was obliged to adduce evidence to establish *prima facie* that it was liable to a third party making a claim against it. The relevant principles are

⁹ 1998 (3) SA 861 (SCA) at 869.

neatly summarised by Hofmeyr¹⁰ where the learned author states the following:

‘Where the facts are peculiarly within the knowledge of the opposite party, less evidence will suffice to establish a *prima facie* case than would under other circumstances be required. When the party having knowledge of the facts and in a position to rebut them, if they are capable of rebuttal, chooses not to do so, that in itself is a factor that reinforces the *prima facie* case already before the court.

While it is unquestionably true that an applicant is generally speaking obliged to adduce evidence in order to establish a *prima facie* case against the party whose property is sought to be arrested (or attached), this requirement may in exceptional circumstances be relaxed. The requirement was relaxed in *The Tigr* and in *The Summit One*. In both cases the nature of the application was such that the *prima facie* case sought to be established and other allegations made by the applicants were of a necessity mutually destructive... In both cases, because of the special circumstances, the court was prepared to have regard to the allegations in the pleadings in determining that a *prima facie* case had been made out.’

[21] An immediate point of distinction between the facts in *casu* and that in the *Tigr* is of course that at present no allegations in pleadings have yet been made against Interis. Only vague allegations from correspondence exchanged higher up the charter party chain have been referred to.

[22] More importantly however is that nowhere in the founding affidavit in the arrest application, or thereafter, was the anomaly of Marubeni being addressed as the shipper while the bill of lading reflects the shipper as ‘LOC URUGUY SA’, thus possibly suggesting more than one shipper, expressly raised or relied upon as a point in some way presenting a case to be answered and which, if not addressed, would be relied upon to establish a *prima facie* case. Indeed, as pointed out by Marubeni, reliance was placed on a single bill of lading, bill of lading No. 1 only, which was annexed as an annexure. Mr Fitzgerald accordingly submitted, correctly in my view, that if Marubeni agreed that the cargo in question was being conveyed under the one bill of lading, that there was nothing for it to comment on further.

¹⁰ Hofmeyr *Admiralty Jurisdiction Law and Practice* p 125.

[23] In annexure JRK 10 to the founding affidavit in the arrest application, being the demand addressed to Fuk Hing higher up the charter party chain, the author of that letter had asserted that the cargo was physically shipped at Montevideo by '9 different shippers' and that the 'processes of cargo so combined under one bill of lading did not conform to the description of soya beans which could withstand the ordinary voyage...'. If Intergis believed that there was more than one shipper involved based on that letter, contrary to what the single bill of lading *ex facie* its terms evidences, then it should at least have made such an allegation, or at the very least expressed such a suspicion, in the founding affidavit in the arrest application. Nowhere in the founding affidavit in the arrest application was there ever any suggestion of more than one bill of lading and more than one shipper being involved. Marubeni accordingly was under no duty to comment further on the allegation by Intergis of a single bill of lading, where that was indeed what they accepted the position to be, and Intergis' contentions remain speculative and without foundation. In the words employed in *MT Tigr*¹¹ if the allegations made by Intergis were advanced in pleadings, the pleading would be excipiable or otherwise without substance.

[24] The allegations in the affidavits do not go beyond there being a single bill of lading and the cargo forming the subject matter thereof comprising nine parcels. That is not in dispute. Evidential considerations, or questions of the sufficiency of evidence, do not arise. The fact that the consignment might have comprised nine parcels is legally irrelevant in the light of the undisputed fact that the cargo was the subject of a single bill of lading, and it is only in respect of that cargo, loaded into holds 1, 3, 4, 5 and 7, that the alleged claim arises.

[25] Intergis has failed to establish a *prima facie* claim as required.

A Genuine and Reasonable Need for Security

¹¹ at 871 B.

[26] In the light of my aforesaid conclusion, it is strictly speaking unnecessary for me to consider whether Intergis has established a genuine and reasonable need for security on a balance of probabilities.

[27] It was incumbent on Intergis, as the Applicant in the arrest application, to show that Marubeni, being the corporation against which security was being claimed, was in a financially precarious position or would not otherwise be able to meet any judgment obtained against it of the nature contemplated in the *MV Rizcun Trader (4); MV Rizcun Trader v Manley Appledore Shipping Ltd*.¹² There it was held that it would not be sufficient for an applicant for arrest to show that the corporation against which it claims did not have assets within the jurisdiction where the claim was to be enforced, if it had sufficient assets outside the jurisdiction to meet the claim.

[28] Statements like that in *Bocimar NV v Kotor Overseas Shipping Ltd*¹³ commenting on remarks by the Judge in the court *a quo*:

‘...that in the ordinary course where the Applicant holds no existing security for his claim this requirement would present no difficulty. In the absence of anything to the contrary, the natural inference would be that there is a need for security.’

must also be understood in the context of that case and are not of universal application.

[29] Intergis also placed reliance on the following statement by Davis J in *The Peregrine III; Lisnave Estaleiros Navais SA v Falcon Drilling Co Inc*.¹⁴

‘The shipping business is a notoriously volatile enterprise. A company which exhibits financial strength in one year may well disappear by year three. In addition a controlling company may decide to restructure its subsidiary operations as indeed has occurred within the Falcon Group. Corporate changes become notorious, particularly within a market exhibiting a high level of volatility. Accordingly Applicant has genuine reason to demand the provision of sufficient security to cover the amount of the claim plus interest and costs on the basis of its reasonably arguable best case.’

¹² 2000 (3) SA 776 (C) at 804 I.

¹³ 1994 (2) SA 563 (A) at 580 D-E.

¹⁴ SCASA B73 (C) at B80

[30] The uncertainty of a respondent's financial viability in the future also arose in *MV Wisdom C United Enterprises Corporation v STX Pan Ocean Co. Ltd.*¹⁵ This had been based on there being 'no guarantee as to what its financial position will be in the future, the shipping industry being notoriously volatile.' The judgment in the *Wisdom C* however did not refer to the above comments in *Peregrine III*.

[31] In *MV Orient Stride; Asiatic Shipping Services Inc v Elgina Marine Co Ltd*¹⁶ the Supreme Court of Appeal held that a genuine and reasonable need for security did not mean that in every case it must be proved that the party whose property is arrested has or will have insufficient assets to meet a judgment granted against it in the main proceedings. What must be established is a genuine and reasonable apprehension that the party whose property is arrested will not satisfy any judgment or award made in favour of the arresting party. This apprehension may be founded upon actual knowledge of the extent of the assets of the party whose property has been arrested, or it may be founded on factors giving rise to an inference that the party in question will be unable to meet the judgment, or that, whether for geographical reasons or otherwise, it will be extremely difficult for the Applicant to enforce any judgment in its favour. Evasive responses by Respondent that it has more than sufficient assets to satisfy any judgment without furnishing any details of the nature and extent of the assets may, together with other circumstances, result in a finding that an applicant has succeeded in establishing the existence of a reasonable apprehension.¹⁷

[32] In *casu*, Intergis has relied on the volatility of the maritime industry (although recognising that Marubeni is not an entity confining its operations to shipping, but also a trading company not entirely dependent on the volatility of the shipping industry). Some commentators have commented adversely on

¹⁵ 2008 (3) SA 585 (SCA) at 592 I.

¹⁶ 2009 (1) SA 246 (SCA) at 248 F – 249 B.

¹⁷ See also Hofmeyr *Admiralty Jurisdiction Law and Practice in SA* para 11.14.

its long term viability and other negative factors, such as a drop in its share price. Marubeni has however not left these criticisms unchallenged. It has provided its non-consolidated financial statements which show a significant increase in cash on hand reserves and a significant increase in its total equity for its 92nd business year ending at 31 March 2016, when compared to the 91st business year which ended on the 31st March 2015.

[33] The parties were agreed, in my view correctly so, that Marubeni would in the event of any dispute of fact have the benefit of the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.¹⁸

[34] On that basis too, I conclude that Intergis has not discharged the onus of establishing a genuine and reasonable need for security.

Supplementary Affidavit

[35] Intergis has also sought to introduce a further affidavit. Marubeni did not agree to this affidavit serving before me, but the parties adopted the practical solution that I could have regard thereto with due reservation of Marubeni's opposition to it being admitted. As I indicated during argument, nothing material turned on the contents of this further affidavit and it has been of no consequence to the conclusions I have reached in this judgment. I accordingly simply intend making no order in respect thereof.

The Postponement Application

[36] On 14 October 2016 Intergis applied for a postponement of the hearing of this application on the basis that it required additional time to obtain more details of claims being made higher up the charter party chain and to file further affidavits to set out the nature of its claims against Marubeni in more or better detail. I refused the application with costs and indicated at the time that my reasons would follow later. I intend being very brief in that regard.

¹⁸ 1984 (3) SA 623 (A)

[37] I have for the purposes of the application to set aside and also the postponement application, accepted the factual correctness of the allegations advanced by Intergis.¹⁹ No prospect could be expressed in the postponement application, beyond a mere forlorn hope, that something might emerge from the further exchanges of correspondence between attorneys, which might possibly advance the case of Intergis. If an application for a postponement is to succeed on the basis that a party wishes to place further facts or evidence before a court, then the nature of that evidence, particularly the materiality thereof and the impact on the result, along with cogent reasons why this evidence was not placed before the court before, need to be advanced.²⁰ I was left totally without any basis upon which to make any determination as to whether any additional evidence would become available, and if so, whether it would be material to the outcome of the setting aside application, rather than just being a *spes* that it might contribute to that debate. Intergis bore the onus of satisfying those requirements but, despite Mr *Wragge's* best attempts to do so, failed to advance a factual foundation on which such an application could succeed.

Costs

[38] Apart from the costs of the arrest application and this application, there are also the costs of an application earlier this year to compel the delivery of an answering affidavit. The parties were agreed that the costs relating thereto should simply be costs in the cause. That certainly seems to me to be prudent and I intend sanctioning that suggestion of the parties.

[39] Marubeni has sought an order that the setting aside application succeed, and that the arrest be set aside, with costs on the attorney and client

¹⁹ These are of a hearsay nature, as they customarily are in applications of this nature. Why it should be so in this modern era of electronic communications might be something to be revisited at some stage. In some instances they constitute double hearsay, as they also include allegations made up the charter party line by other charter parties prior to Intergis..

²⁰ *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS)

scale. Essentially, the punitive award of costs was sought on the basis that the arrest was without any proper legal foundation.

[40] As much as Intergis has been unsuccessful, it has not been guilty of conduct which would justify a punitive award of costs as a mark of disapproval of its conduct. It is in an invidious position, being faced with a claim from IBCI (which it apparently contractually bound itself to for security), is aware of claims made higher up the charter party chain, and was aware of another arrest having been granted in this court at the instance of Solbay Shipping Limited on the 11 November 2015 for the attachment of certain bunkers on board the MV “Jag Arya”. Its legal representatives presented what was always going to be a difficult case, as best and as honestly as they could. Certainly, where the test is one of a *prime facie* case, their judgment call to proceed with the application for arrest, cannot be criticised.

[41] In the exercise of my discretion on costs, I am of the view that the costs of the applications must follow the result but only on the party and party scale.

[42] I was not addressed specifically on whether the costs of two counsel as sought by the Applicant should be allowed. Intergis was represented by one counsel only. Although the amount involved is substantial, the matter was not one of particular complexity and could comfortably be dealt with by senior counsel. I accordingly do not award the costs of two counsel.

Order:

[43] I grant the following order:

- (a) The order granted by this court on 30 December 2015 for the arrest of the MV “IVS Crimson Creek” under Case No. A122/2015 is set aside.
- (b) The letter of undertaking dated 6 January 2016 furnished to Intergis Co. Limited to secure the release of the MV “IVS Crimson Creek” must be returned to the Applicant’s attorneys forthwith;

- (c) The Respondent, Intergis Co. Limited is directed to pay the costs of this Application, which will include the costs previously reserved and the costs of the arrest application.

Appearances

For the Applicant: M J Fitzgerald SC with J Thobela Mkhulisi
Instructed by: COX YEATS
Ref: A Clark/T Viljoen/L Maitre/9 M020 001
Tel : 031 – 536 8500

For the Respondent: M Wragge SC
Instructed by: EDWARD NATHAN SONNEBERGS INC.
C/O Edward Nathan Sonnebergs Inc.
Ref.: Tony Nathan
Tel : 031 536 8500