THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 33/06

NAME OF VESSEL: MV *SPIRIT OF NAMIBIA*

In the matter between:

BIG RED ONE INCORPORATED — **First Appellant**

QUARTERDECK PROSPECTING AND MINING (PTY) LTD — **Second Appellant**

and

MARCO FISHING (PTY) LTD — **Respondent**

Coram: **SCOTT, STREICHER, FARLAM, MTHIYANE *et* NUGENT JJA**

Date of hearing: **22 MAY 2006**

Date of delivery: **1 June 2006**

Summary: **Sale of ship *pendente lite* in terms of s 9(1) of Act 105 of 1983**

Neutral citation: **This judgment may be referred to as MV *Spirit of Namibia* [2006] SCA 86 RSA**

JUDGMENT

SCOTT JA/…

SCOTT JA:

[1] On 17 November 2004 the respondent, a Namibian company, (to which I shall refer as Marco) launched an application in the Cape High Court for an order authorising the sale *pendente lite* of the MV *Spirit of Namibia* which had been tied up in Cape Town harbour under attachment since August 2002. The granting of the order was opposed by both her owner and head-demise charterer who are the appellants in this appeal. The former is Big Red One Incorporated, a company of Tortola, British Virgin Islands. I shall refer to it as 'Big Red'. The latter is Quarterdeck Prospecting and Mining (Pty) Ltd, a South African company and the holding company of Big Red. After the exchange of the usual affidavits, the matter was argued on 3 March 2005 before Veldhuizen J, who on 23 September 2005 gave judgment in favour of Marco. The order was in the form of a *rule nisi* and contained detailed provisions for the sale of the vessel and the establishment of a fund which was to be subject to the control of the registrar in accordance with Rule 21(7)(a)(i) of the Admiralty Proceedings Rules. The *rule nisi* was subsequently confirmed by Griesel J on 14 November 2005. The appeal is with the leave of Veldhuizen J.

[2] Before considering the issues raised in argument it is necessary to set out in some detail the events which led up to the attachment of the *Spirit of Namibia* and the subsequent application for her sale *pendente lite*.

[3] On 7 June 2002 the fishing vessel *Meob Bay*, which was owned by Marco, sank off the Namibian Coast while proceeding from the port of Luderitz to the fishing grounds. Marco alleges that the loss occurred as a result of the vessel's propeller fouling a polypropylene rope floating on the surface, which was attached to a steel anchor on the sea bed. It alleges further that the rope and anchor had been left where the loss occurred by the servants of a Namibian company, Gemfarm Investments (Pty) Ltd, ('Gemfarm') which was the sub-demise charterer of the MV *Lady S*, being the vessel it employed in the conduct of its business of marine mining. At the relevant time Gemfarm and the

appellants were associated companies. It was initially a party to the proceedings in the court *a* quo but has since been placed in liquidation.

[4] On 23 August 2002 Marco sought and obtained ex parte a *rule nisi* and interim order for the attachment of Gemfarm's right, title and interest as demise charterer in the *Lady S* as well as Gemfarm's right, title and interest to any additional equipment, victuals, supplies and fuel on board the *Lady S*. The attachment was effected to found jurisdiction in an action *in personam* which Marco intended to institute against Gemfarm for damages. By agreement the return day was postponed to 18 February 2003. Gemfarm was unable to put up any form of security or letter of undertaking to procure the release of the *Lady S*, which it required to continue its mining operations. However, Gemfarm was also the sub-demise charterer of the *Spirit of Namibia* which was owned by Big Red and was then in Cape Town harbour undergoing, it was said, an extensive refit and modification which would keep it in port for two to three months. The appellants through their attorney represented that the unencumbered equity in the *Spirit of Namibia* amounted to some R35 million. It was accordingly proposed to Marco that the *Spirit of Namibia* be substituted for the *Lady S*. On 29 August 2002 a substitution agreement was entered into between Marco, Gemfarm, Big Red and Quarterdeck. (The latter was the head demise charterer of both vessels.) In terms of the agreement, which was made an order of court, Big Red undertook personal liability for payment of any amount found due by Gemfarm and agreed to the attachment of its vessel, the *Spirit of Namibia*, to found the court's jurisdiction over it in respect of its undertaking. In return it was agreed that Gemfarm's rights in the *Lady S* would be released from attachment and that those rights would thereafter be deemed to be attached pursuant to the provisions of ss 3(10)(a)(i) of the Admiralty Jurisdiction Regulation Act 105 of 1983 ('the Act'). The subsection reads:

'Property shall be deemed to have been arrested or attached and to be under arrest or attachment at the instance of a person if at any time, whether before or after the arrest or

attachment, security or an undertaking has been given to him to prevent the arrest or attachment of the property or to obtain the release thereof from arrest or attachment.'

Pursuant to the order, the *Spirit of Namibia* was duly attached and the *Lady S* released from attachment.

[5] On 18 February 2003, being the postponed return day of the *rule nisi*, Gemfarm and Big Red opposed the granting of a final order of attachment. Their right to do so had been reserved in terms of the substitution agreement. The ground upon which they relied was that Marco had not discharged the burden of showing that it had a *prima facie* case against Gemfarm based on negligence. They disputed that the rope that fouled the *Meob Bay*'s propeller was one left by the *Lady S* and argued that, if it was, it did not follow that Gemfarm's servants had been negligent. They disputed too that the fouling of the *Meob Bay*'s propeller would have caused the loss and argued that either the vessel had been unseaworthy or that her master and crew had failed to exercise the necessary degree of seamanship. The matter was heard by Van Reenen J, who eventually handed down judgment on 29 September 2003 confirming the attachment. (The judgment is reported *sub nom Marco Fishing (Pty) Ltd v Gemfarm Investments (Pty) Ltd* [2003] 4 All SA 614 (C).) By then the *Spirit of Namibia* had been under attachment for more than a year.

[6] In the meantime, on 19 December 2002 Marco instituted its action *in personam* against Gemfarm and Big Red, claiming N $ 7 981 455 (about R8 million) plus interest and costs. The parties exchanged pleadings with little sense of urgency but in fairness to them they would have been uncertain whether the attachment would be confirmed. While also still awaiting the judgment of Van Reenen J, and following a survey of the vessel, Marco launched an urgent application on 28 August 2003 in which it alleged that subsequent to the attachment, the *Spirit of Namibia* had been stripped of a considerable amount of equipment, much of which had been installed on the mining vessel *Anya* in which Gemfarm had an interest and which was owned by a company called Lazig

Marine (Pty) Ltd. Relying on the report of a marine surveyor, Mr Paul Coxon, Marco contended further that the *Spirit of Namibia* had been reduced to a 'neglected hulk' with a concomitant reduction in value from about R20 to R25 million to about R5.5 to R6 million. The relief it sought was an order directing the sheriff to board the *Anya* and attach the various items of equipment which had been identified by Marco as having been removed from the *Spirit of Namibia*. A *rule nisi* was issued returnable on 26 September 2003, but was anticipated by Gemfarm and Big Red. In an answering affidavit, Mr Gershon Ben-Tovim simply denied without elaboration the allegation of stripping and consented to an order that Gemfarm furnish security equal in value to the items alleged to have been removed. The matter came before Davis J, who, with commendable promptitude, delivered judgment on 15 September 2003. In terms of the judgment, Gemfarm was ordered to furnish security to Marco in the sum of R3.5 million. Two weeks later, ie on 29 September 2003, judgment was given confirming the attachment.

[7] In July 2004 Coxon conducted a further survey of the *Spirit of Namibia.* He reported that in the absence of any maintenance work the vessel had deteriorated considerably since his last inspection in June 2003; he expressed the view that it would be uneconomical and not commercially viable for the vessel to be restored, whether as a mining vessel or a general purpose vessel, and that her only value was value as scrap. After making inquiries at overseas scrap yards he expressed the view that the vessel would fetch somewhere between US $230 and US $300 per ton as scrap. I interpose that Captain Roy Martin, who is the managing director of a ship brokering company and who deposed to an affidavit on behalf of the appellants, reported that the delivered scrap value in India was US $300 per ton. Working on a scrap value of US $ 300 per ton, an overall tonnage of 1400 tons and an exchange rate of R6.5 to the US dollar, Coxon calculated the delivered scrap value of the vessel to be R2.73 million. From this, he said, there had to be deducted the cost of towage which he estimated at R1 228 500, leaving a balance of some R1.5 million. This valuation was not seriously contested. Martin made no reference to it in his affidavit and Mr

Saar Ben-Tovim, the general manager of Gemfarm who did not profess to be an expert, simply asserted without elaboration or reasons that the 'value ascribed by Coxon [was] too low'. In these circumstances Coxon's valuation of the vessel as at July 2004 must be accepted.

[8] The port dues in respect of the *Spirit of Namibia* were then being incurred at the rate of R30 000 per month. By 26 September 2004 the outstanding port dues amounted to R837 974.96. In terms of s 11 of the Act the claim for port dues would rank ahead of Marco's claim, as would the costs of procuring the sale of the vessel. In the event of a sale in execution at that stage the amount available for distribution would accordingly have been no more than about R700 000. Cost orders had also been made in favour of Marco both in the attachment proceedings and in the proceedings arising out of the alleged stripping of the vessel.

[9] In the meantime, the trial in the main action had been set down for hearing on 1 November 2004. An application had also been brought by a creditor on 21 June 2004 to have Gemfarm provisionally wound up. The application, which Gemfarm opposed, was postponed to 10 February 2005. Marco delayed its preparations for trial until it appeared that a winding order would not be granted. In the result it was late in making discovery; Big Red and Gemfarm launched an application for a postponement and by agreement the trial was postponed to 23 August 2005 when it was again postponed.

[10] As previously indicated, the application which is the subject of the present appeal was launched on 17 November 2004. On 11 February 2005, and before the matter was argued, Gemfarm was provisionally sequestrated. We were informed by counsel that the provisional order has since been made final.

[11] In terms of ss 9(1) of the Act, a court is afforded a wide discretion to order 'at any time' that property 'which has been arrested in terms of this Act be sold'.

Although the subsection speaks of property that has been arrested, it applies equally by reason of ss 8(2) to property that 'has been attached to found or to confirm jurisdiction relating to a maritime claim'. Marco's claim against Gemfarm was a maritime claim as defined in para (e) of ss 1(1) of the Act. Its claim against Big Red and Quarterdeck is a maritime claim as contemplated in paras (ee) and (ff) of that subsection.

[12] The Court *a quo*, in a short judgment, found that in all the circumstances of the case the sale of the *Spirit of Namibia* was justified and in pursuance of that finding made the order that it did. It did not deal with an argument which counsel for the appellants said he had advanced, namely that properly construed the substitution agreement precluded the sale *pendente lite* of the *Spirit of Namibia*. In this court counsel confined his argument to that issue (and a further point about what could be sold, which I shall deal with later) and indicated that should it fail he would no longer persist in the contention that the sale of the vessel was not justified in the circumstances. Before, however, considering the meaning to be attributed to the substitution agreement I find it necessary to say something about the manner in which the proceedings were conducted in the court below.

[13] In the ordinary course of events when a ship is arrested or attached and the owners are seriously intent on defending the action, the release of the ship is almost invariably procured by the owners putting up security or providing a letter of undertaking. But it does happen that on occasions the owners, although contesting their liability, either refuse or are unable to furnish some form of security to the satisfaction of the plaintiff. In such an event it is imperative that every effort be made to have the dispute resolved with the utmost expedition. Regrettably this did not happen in the present case; nor do the papers reveal any proper explanation for the inordinate delay that occurred. The initial attachment was made on 23 August 2002. Because the *Lady S* was no doubt urgently required for Gemfarm's mining operations, the substitution agreement was negotiated and concluded within six days. But thereafter all sense of urgency

appears to have been abandoned. The return day of the attachment order was extended by agreement and the parties exchanged affidavits apparently at their leisure. Almost six months passed before the matter was finally argued on 18 February 2003. Judgment was then reserved, regrettably for a period of more than eight months. Even then the parties appear to have made little effort to expedite the proceedings. The trial did not proceed on 1 November 2004 but was postponed to 23 August 2005 because, it was said, there had been late discovery by Marco and the matter was not 'ripe' for hearing. By 1 November 2004 the vessel had been tied up in Cape Town harbour under attachment for well over two years. In these circumstances one would have expected the legal representatives of the parties to have suffered the inconvenience of late discovery and if necessary to have burnt the midnight oil to ensure that the trial proceeded.

[14] The courts have in the past stressed that the power afforded by s 9 to order the sale of property *pendente lite* will be sparingly exercised, particularly where there is a reasonable prospect, as there is in the present case, that the owner will be able to show that the ground for the arrest or attachment is not a good cause of action. See eg the *MT Argun* 2001 (3) SA 1230 (SCA) para 34 and the cases there cited. See also Shaw *Admiralty Jurisdiction and Practice in South Africa* at 68; Hare *Shipping Law and Admiralty Jurisdiction in South Africa* at 105. Nonetheless, the length of time a vessel is likely to be detained and the costs involved in maintaining the vessel are often decisive in determining whether a sale *pendente lite* should be ordered. Thus in the *Myrto* [1977] 2 Lloyd's Rep 243 (QB Adm Ct) Brandon J at 260 considered that an anticipated delay of a further 18 months (the vessel had already been under arrest for three months) and the costs involved in maintaining the vessel during that period justified a sale *pendente* lite. The learned judge characterised an argument resisting the sale in such circumstances as lacking reality. A similar approach was adopted in the *Gulf Venture* [1985] 1 Lloyd's Rep 131 (QB Adm Ct).

[15] In the present case, whatever justification there may have been for resisting the sale of the *Spirit of Namibia* has, in my view, long since ceased to be of any relevance on account of the inordinate delays that have occurred in the conduct of the proceedings. By reason of the deterioration of the vessel and the extent of the outstanding amount owing in respect of port dues, the balance available in the event of a sale of the vessel would, as long ago as September 2004, have been no more than about R700 000. By the time the court *a quo* gave judgment that amount would have been further reduced by some R360 000, being the increase in outstanding port dues. The remaining balance of R340 000 would then not even have been sufficient to cover Marco's costs in the attachment and 'stripping' applications. Those had been taxed at R371 182,54 and R152 231,94 respectively. Subject to the question of the interpretation of the substitution agreement – to which I shall turn – any argument that the vessel should not be sold would therefore have been wholly unrealistic. In the circumstances, counsel had little option but to make the concession he did.

[16] Two grounds were advanced in support of the contention that the sale of the vessel *pendente lite* was precluded by the substitution agreement. The first, shortly stated, is as follows. The jurisdictional element necessary for the pursuit of the claim against Gemfarm was provided by the deemed attachment in terms of ss 3(10)(a)(i) of the Act (quoted in para 4 above); the purpose of the attachment of the *Spirit of Namibia*, on the other hand, was to provide security, in the form of a pledge, for Big Red's accessorial obligation to Marco as surety. Accordingly, so it was argued, the attachment was not an attachment in terms of ss 3(2)(b) simpliciter and the vessel did not constitute property which had been arrested (or attached) in terms of ss 9(1) read with ss 8(2) of the Act. In my view there is no merit in the submission. The first two clauses of the substitution agreement read:

'1. Big Red undertakes personal liability for the payment to Marco of any amount found due to Marco by Gemfarm in the action.

2. The MV S*pirit of Namibia*, and all of Big Red's right, title and interest therein, shall be attached by the Sheriff pursuant to an order to be obtained by Marco with the agreement

> of Big Red and Gemfarm immediately upon this agreement being made an order of court, the attachment being to found the jurisdiction of the Honourable Court over Big Red in the action which Marco intends to institute against Gemfarm and Big Red.'

It is clear from these provisions that Big Red is not a surety; it interceded as a co-principal debtor whose liability was not dependent on the failure of Gemfarm to pay. (For the distinction between a surety and an intercessor see eg Forsyth & Pretorius *Caney's The Law of Suretship* 5 ed at 33.) Furthermore, and in any event, the agreement expressly provides that the *Spirit of Namibia* was attached to found the jurisdiction of the court over Big Red in respect of a claim which, it was common cause, was a maritime claim. The vessel was therefore attached to found jurisdiction 'relating to a maritime claim' within the meaning of ss 8(2). It accordingly constituted 'any property' within the meaning of ss 9(1) and in terms of that subsection could be ordered to be sold 'at any time'.

[17] The second ground relied upon was based on the wording of clause 7 of the agreement. It reads:

> 'In the event of Marco succeeding in its intended action against Gemfarm and Big Red, and of Gemfarm and/or Big Red not immediately paying the judgment debt, execution may be levied upon the MV *Spirit of Namibia* and/or she will be sold in accordance with the provisions of Act No 105 of 1983 and the Admiralty Proceedings Rules, free of any encumbrances and free of any possessory rights which Quarterdeck and Gemfarm may have as head charterer and sub-charterer respectively of the MV *Spirit of Namibia'*.

It was contended on behalf of the appellants that the effect of this provision was that the *Spirit of Namibia* could only be sold in the event of Marco obtaining judgment in its favour and neither Gemfarm nor Big Red immediately paying the judgment debt. In my view this contention must also fail. The clause is permissive, not restrictive, in its effect. It permits Marco to execute against the vessel in the circumstances mentioned. It does not purport to restrict any of Marco's rights arising out of the attachment, nor can I see any basis for reading such a restriction into the clause. It is concerned with the matter of execution

after judgment, not the sale of the vessel *pendente lite* and the establishment of a fund with the proceeds.

[18] In the alternative, it was argued that the order of the court *a quo* was in any event too widely stated as it authorised the sale of the vessel 'including her equipment, furniture, stores and bunkers' and these items were not included in the attachment order granted on 29 August 2002. In support of this contention, counsel for the appellant drew attention to the distinction between the attachment order of 29 August 2002 and the order granted on 23 August 2000 in relation to the *Lady S*. In the latter a distinction was drawn between Gemfarm's right title and interest in the *Lady S* and Gemfarm's right, title and interest in 'any additional equipment, victuals, supplies and fuel currently on board the vessel'. The order of 29 August simply authorised the sheriff to 'attach [Big Red's] right, title and interest in the MV *Spirit of Namibia* in accordance with the provisions of the said agreement'. (The relevant provision is clause 1 which is quoted in para 16 above.)

[19] In response, counsel for Marco pointed out that there was a good reason for the distinction between the two attachment orders. In the case of the attachment in relation to the *Lady S*, Gemfarm's right title and interest in the vessel was limited to that of a demise charterer and the second leg of the order was included merely to cover any 'additional equipment, victuals, supplies and fuel' that may have belonged to Gemfarm. However, in the case of the *Spirit of Namibia*, which was owned by Big Red, he submitted that it was quite clear that it was the ship itself that was being attached and in the absence of anything to the contrary the attachment would include 'her equipment, furniture, stores and bunkers'. He pointed out further that the only other persons who may have had interest in the *Spirit of Namibia*'s equipment, furniture, stores and bunkers were Gemfarm and Quaterdeck and although they were parties to the submission agreement there was nothing in its provisions to indicate that the equipment etc

was their property. This, he contended, would have been made clear had it been the case.

[20] While much of what counsel for Marco contends is unquestionably correct, it seems to me that it is in any event not open to the appellants to argue at this stage that the order granted by the court *a quo* was too widely stated in the respect contended. The order that was sought and granted clearly reflected Marco's understanding of what was covered by the attachment order made in pursuance of the substitution order. The only parties other than Big Red who could have had an interest in the *Spirit of Namibia*'s equipment, furniture, stores and bunkers were Gemfarm and Quarterdeck. Both were respondents in the court *a quo*. Had their understanding of what was included in the attachment order differed from that of Marco they would no doubt have raised the issue in the papers. But nowhere do they lay claim to anything on board the vessel. Had they done so, Marco could have dealt with the matter in reply. In any event, the point taken by counsel is clearly an afterthought. Had the equipment etc on board the *Spirit of Namibia* not been regarded by the appellants as subject to the attachment order Mr Gershon Ben-Tovim would not in the 'stripping' application have tendered security in an amount equal in value to the items alleged to have been removed.

[21] It follows that the appeal must fail. It is however necessary to correct the order of the court *a quo* in two respects. The reason for the first is that the *Spirit of Namibia* was cited in the court *a quo* as the first respondent as if the vessel had been arrested in an action *in rem*. The draft, which was made an order of the court, similarly refers throughout to the 'first respondent' (and sometimes simply to 'the respondent') when the reference should have been to the *Spirit of Namibia*. The draft incorporated in the order will have to be corrected accordingly. The reason for the second correction is that the judge when granting an order in terms of the draft overlooked that it already contained a provision

dealing with the costs of the application. Because of this, he included a reference to costs in para 17 of his judgment. The paragraph reads:

'The application is granted with costs and the amended draft order marked 'AHV' is made an order of court.'

Paragraph 10 of the draft, however, reads:

'The costs of this application shall forthwith be paid out of the fund on the scale as between attorney and client, as taxed or agreed with respondents' attorneys.'

In the circumstances, the order in para 17 of the judgment will have to be corrected by the deletion of the words 'with costs'.

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

(a) The appeal is dismissed. The respondent's costs are to be paid by Big Red One Incorporated and Quarterdeck Prospecting and Mining (Pty) Ltd, their liability therefor being joint and several.

(b) The order of the court *a quo* is corrected as follows:

(i) The name of the vessel, ie *Spirit of Namibia*, is substituted for the words 'first respondent' and for the word 'respondent', where applicable, in the draft marked 'AHV'.

(ii) The words 'with costs' are deleted.

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D G SCOTT
JUDGE OF APPEAL

Concur:
Streicher JA
Farlam JA
Mthiyane JA
Nugent JA