

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

CASE NO.A66/11

Name of Vessel: MV "NEWLEAD SPARTOUNTA"
In the matter between:

GRAND SPARTOUNTA INCORPORATED	First Applicant
GRAND RODOSI INCORPORATED	Second Applicant
BRAZIL HOLDINGS LIMITED	Third Applicant
GRAND OCEANOS INCORPORATED	Fourth Applicant
GRAND VENETICO INCORPORATED	Fifth Applicant

and

TMT BULK CORPORATION	Respondent
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JUDGMENT

Delivered : 13 November 2012

KING AJ

[1] On 5 July 2011, the MV "NEWLEAD SPARTOUNTA" was placed under arrest at the instance of the Respondent. The owner of that vessel is the First Applicant in these proceedings, which are brought to set aside that arrest.

[2] The Respondent applied for such arrest on the basis that the "NEWLEAD SPARTOUNTA" was associated with the other vessels which are involved in this application. Those other vessels are the "GRAND RODOSI", the "BRAZIL", the "GRAND OCEAN" and the "GRAND VENETICO", which are owned, respectively, by the Second to Fifth Applicants. In the arrest application, the Respondent alleged that it had claims against these four

vessels that ought to be secured, pending the outcome of various arbitration proceedings which would finally decide those claims.

[3] Soon after the arrest of the “NEWLEAD SPARTOUNTA, security, in the sum of US\$ 1,928 745.00 was put up, which allowed that vessel to proceed on its way, whilst remaining under deemed arrest, under the provisions of the Admiralty Jurisdiction Regulation Act No. 105 of 1983 (“the Act”).

[4] The Applicants then launched these proceedings against the Respondent, seeking to set aside the original arrest order or, alternatively, to amend that order so as to reduce the amount for which security was required. Relief was also sought in terms of which the Respondent was required to return to the Applicants the letter of undertaking which was furnished to provide the security which allowed for the release of the “NEWLEAD SPARTOUNTA” and, in the case of the alternative relief, to substitute it with a letter of undertaking for such lesser amount that this court might order.

[5] This application came before me as an opposed application on 2 November 2012. By that stage, the Respondent had already conceded (for reasons which it said arose from events subsequent to the original arrest), that the need for security in respect of three out of the four associated vessels had fallen away. The Respondent required the security relating only to the “GRAND VENETICO” to remain in place, which involved the sum of US\$ 657,313.50 plus estimated interest in the sum of US\$ 105,666.11 and anticipated costs in the sum of US\$ 200,000.00.

[6] The Applicants’ case may be summarised as follows :-

- (a) The Respondent brought its application for arrest (the arrest application”) on an *ex parte* basis and it accordingly owed to the Court a duty to disclose all material facts which might affect the Court’s decision on the application. The Applicants allege that the Respondent failed to disclose material facts which were

relevant to the issues and, accordingly, the arrest order should be set aside in its entirety.

- (b) Alternatively, upon the facts which were disclosed in the arrest application, the Respondent did not discharge the onus upon it to demonstrate that there existed a genuine and reasonable need for security in respect of all of its claims against the four vessels. In addition, in the case of the “GRAND VENETICO”, the Respondent failed to show that it had a *prima facie* claim against the Fifth Applicant. Accordingly, the arrest order should be set aside anyway simply because the Respondent failed to make out a proper case for granting it.
- (c) In the further alternative, and if the court found that a case was made out in respect of only some of the Respondent’s claims, the arrest order should be amended accordingly and the terms of the related letter of undertaking amended as well.

[7] The Respondent’s case may be summarised as follows :-

- (a) All the material facts were disclosed to the court in the founding papers for the arrest and a proper case was made out in respect of all four claims, both as to the existence of a *prima facie* claim and also as to the genuine and reasonable need for security.
- (b) However, events which took place subsequent to the arrest, relating to developments in the aforesaid arbitration proceedings, rendered it unnecessary to keep in place all of the security obtained for the claim relating to the “GRAND OCEAN”. The Respondent agreed that it should be reduced by US\$ 15,452.5 (plus an appropriate proportion of the interest and costs which were secured as well).

[8] Subsequently, further facts came to light in the Replying Affidavit filed

on behalf of the Applicants and in a later Supplementary Affidavit. In the case of the “GRAND RODOSI”, arbitration proceedings were finalised by way of an award in favour of the Second Applicant in respect of its claims and the claims advanced by the Respondent in relation to that vessel were dismissed. In arbitration proceedings related to the “BRAZIL” and the “GRAND OCEAN”, arbitrators made interim awards in favour of the Third and Fourth Applicants in amounts equal to the claims advanced by those Applicants, less the claims advanced by the Respondent against them. In the case of the “GRAND VENETICO”, the relevant arbitrators made an interim award in favour of the Fifth Applicant for the full amount of its claim against the Respondent, without making any reduction to take account of the Respondent’s counter-claim against that vessel.

[9] Accordingly, by the time that the Respondent delivered its Heads of Argument in this application, it conceded that it no longer required any security in relation to its claims against the Second, Third and Fourth Applicants but that its claim against the Fifth Applicant should remain secured because the interim award made in respect of the “GRAND VENETICO” had not been reduced so as to take account of that claim.

[10] The most important complaint raised by the Applicants in relation to what facts were disclosed to the court in the arrest application is one which is common to the issues arising in relation to all the vessels. That complaint cannot be dealt with, in isolation, in relation to the “GRAND VENETICO” only. In addition, the Applicants sought a punitive order for costs against the Respondent, said to be justified on the basis of the Respondent’s conduct in failing to disclose material facts in its founding papers. The result of these matters is that it remains necessary to consider the issues relating to the Respondent’s alleged failure to disclose material facts, in relation to all the vessels, even though the security relating only to the “GRAND VENETICO” remains in dispute.

[11] However, another alleged non-disclosure of facts, relating only to the “GRAND RODOSI”, sits upon a foundation different to that relating to the other vessels. I shall deal with it first. In the arrest application, the Respondent says it was “in dispute” with the Second Applicant and it put up, as annexures, copies of the claim and counterclaim advanced by the Second Applicant and the Respondent, respectively, in the arbitration proceedings in London in which those disputes were to be aired. The Second Applicant’s claim was for payment of US\$ 562,499.99 plus interest and costs, made up of hire instalments said to be payable by the Respondent to the Second Applicant under a charterparty in respect of the “GRAND RODOSI”. Part of the claim documents put up included a provisional final hire statement prepared by the Second Applicant in which it set out the detailed calculation of its claim. The counterclaim put up by the Respondent appeared as annexure “G” to its arrest papers, at pages 245 to 264 thereof and it included what it described as its final hire statement in which the Respondent set out its calculation of what it alleged was due to the Second Applicant.

[12] It must be remembered that the arrest application, with all its annexures, ran to over 500 pages and, as is usually the case, it was brought as a matter of extreme urgency. The papers were signed on 4 July 2011 and the court was asked to hear the matter on 5 July 2011. The bulk of the papers, and the haste with which the court was expected to deal with the arrest application are matters which are relevant and to which I shall return later.

[13] In the arrest application, the Respondent set out six claims against the Second Applicant, for which it sought security, alleging that those claims, and the justification thereof, were set out in the annexed counterclaim. Nothing was said in the arrest application about any part of the Second Applicant’s claim being undisputed. An ordinary reading of the Founding Affidavit would lead anyone to conclude that the claims advanced by the Second Applicant were all disputed, as were the counterclaims advanced, in turn, by the Respondent. Thus, the impression created was that these claims and

counterclaims were all subject to the usual vicissitudes of litigation by arbitration and only the ultimate award of the arbitrators would determine which claims were good and which were not. In fact, the concluding paragraphs of the arrest Founding Affidavit make the point that all the claims which had been advanced by the Second to Fifth Applicants had, in other proceedings, been secured by the Respondent whereas the Respondent did not have any security in respect of its claims. Even the Respondent's affidavit in this application adopts this theme. In paragraph 10 of the Answering Affidavit (at page 116 of the papers) the Respondent contends that each claim and counterclaim in the various arbitrations referred to in the Applicants' Founding Affidavit is "self-standing and independent". It is said that even though the ultimate arbitration award might result in a greater amount being awarded in favour of one or other of the Applicants in relation to what was awarded to the Respondent is "immaterial to the validity" of the Respondent's counterclaim which should nevertheless be secured until that ultimate arbitration award is made.

[14] However, if one examines the claim and counterclaim documents put up in the arrest application by the Respondent, relating to the "GRAND RODOSI" arbitration, the factual picture which emerges is quite different to what was alleged in the Founding Affidavit. I may say that uncovering these facts was, in light of the bulk and complexity of the papers, no simple matter. It required a detailed and careful analysis of the annexed documents, particularly the statements of account put up in support thereof, to uncover the details.

[15] What is most significant is the basis upon which the Respondent, in its statement of account, analysed its position in relation to the Second Applicant's claim for hire charges under the charterparty and the Respondent's counter-claims. In the Respondent's statement of account, after allowing for all the amounts that the Respondent contended were due to the Second Applicant, and after making various deductions, the Respondent arrived, on its own calculations, at the conclusion that it owed to the Second

Applicant the sum of US\$ 48,606.75. In arriving at that calculation, the Respondent had already deducted, from what it admitted was due to the Second Applicant, the majority of the smaller counter-claims which it asserted, in the arrest application, ought to be secured. The only claim which was alleged in the arrest papers as needing to be secured, and which was not already taken into account in the Respondent's calculation of what was owed to the Second Applicant, is the claim for damages referred to in paragraph 21.6 of the Founding Affidavit in the arrest application, in the sum of US\$ 400,000.00. The other smaller claims amounted, in round figures, to about US\$ 46,000.00 and, as I have said, these had already been taken into account by the Respondent, as deductions, in arriving at what it said was owed to the Second Applicant, for the purposes of the "GRAND RODOSI" arbitration.

[16] That these deductions had been made in the arbitration papers was not mentioned at all in the Founding Affidavit of the arrest application. Of course, the Respondent contended that these facts were disclosed in the papers because they emerged from the annexures to which I have referred. That may be so, but it raises the question as to whether any judge should be expected, in dealing with an extremely urgent application, to analyse and digest literally hundreds of pages of annexures, in order to uncover facts which might be relevant to a consideration of the application. I shall return to that question later because the Respondent's failure to disclose the facts in relation to its claims against the Second Applicant, goes much further.

[17] The Respondent's counterclaim in the said arbitration proceedings was delivered on 29 March 2011 and it included a claim against the Second Applicant of US\$ 467,650.00 in respect of a credit which the Respondent says was due to it in respect of the bunkers which remained on board the "GRAND RODOSI" at the time that it was withdrawn from the charterparty. Again, if one analyses the statement of account put up by the Respondent as part of its counterclaim in the arbitration, it emerges that the claim for payment for these bunkers ("the bunkers' claim") had already been deducted by the

Respondent in arriving at its calculation that what was owed by the Respondent to the Second Applicant was the sum of approximately US\$ 48,000.00, to which I have referred earlier.

[18] Annexure “TR4” (at page 53 of the papers) to the Founding Affidavit in this application is a letter dated 7 June 2011 from the Respondent’s Singapore attorney which records that the bunkers’ claim was withdrawn. Such withdrawal, and the date thereof, is not disputed by the Respondent. The consequence is that, when the Respondent made the arrest application, it already knew that its undisputed indebtedness owed to the Second Applicant was not just US\$ 48,000.00 but, as a consequence of the withdrawal of the bunkers’ claim, actually US\$ 516,256.75. Not a word of this is recorded in the Founding Affidavit, nor does it appear from even a careful perusal of the annexures thereto.

[19] At its best for the Respondent, the position painted by it in the arrest papers is, that it owed some US\$ 48,000.00 to the Second Applicant whereas it contended that it was owed some US\$ 446,000.00 by the Second Applicant. The true position was that, on its own version, it owed over US\$ 500,000.00 to the Second Applicant and the only counter-claim which was not already taken into account in that calculation was the damages’ claim of US\$ 400,000.

[20] Are the missing facts material to the arrest application in the sense that they might be relevant to a consideration of the application? In my view, they certainly are. It is one thing to paint a picture, as the Respondent did, that it and the Second Applicant had disputed claims between them which would only be decided, finally, by way of an arbitration award. In that context, it might well be appropriate to provide security for the Respondent’s claims, bearing in mind that the Second Applicant’s claims had already been secured. However, it is quite another matter if the Respondent had set out that, on its own calculations, it owed to the Second Applicant in excess of US\$ 500,000.00 and that, against that, it wished to advance a counterclaim of only US\$ 400,000.00.

[21] In paragraph 65 to 76 of the Respondent's Founding Affidavit in the arrest application, the Respondent made out its case for the conclusion that it had a "genuine and reasonable need" for security. That test is one which has long been accepted as the proper benchmark. It does not necessarily require the Respondent to prove that the Applicants will have insufficient assets to meet any judgment granted against them. However, the Respondent must put up facts which establish a genuine and reasonable apprehension that the Applicants will not satisfy any award made in favour of the Respondent.

Asiatic Shipping Services Inc v Elgina Marine Co. Ltd
2009 SA 236 (SCA) at 248-249

[22] In the arrest application, the Respondent made the case that in light of the downturn in the bulk cargo market and, taking into account certain financial information concerning the Applicants, the Respondent concluded that :

"There is no reasonable expectation that the debt of the Applicant will be settled in respect of any of the particular vessels concerned and there is a genuine and reasonable apprehension that the parent companies of the companies owning the vessels will equally not be in a position to settle the debts to the Applicant".

In other words, the case made by the Respondent, in the arrest application, was that those liable to pay the Respondent would not be able to pay, not that they would seek to avoid payment.

[24] Had the Respondent disclosed the true position concerning the claims and counterclaims between it and the Second Applicant, I have considerable doubt that the learned judge hearing the arrest application would have accepted the Respondent's motivation for security. The true position was that even if the pending arbitration was decided in favour of the Respondent, its best position would be that it would become entitled to deduct its counterclaim

from what it already owed to the Second Applicant. Subject only to the possibility of an interim award in favour of the Second Applicant, with which I shall deal later, there was simply no prospect of the Respondent ever being in the position in which it would be owed money by the Second Applicant, which it might be unable to collect.

[24] In argument, Mr Mullins, for the Respondent, conceded that the failure to record that the bunkers' claim had been abandoned was a shortcoming in the arrest application papers but he urged me to accept that the resulting non-disclosure was not one which was intentional. For present purposes, I am prepared to accept that such was the case but, given the context of the arrest application and the material difference that the abandonment of the bunkers' claim made to the position of the Respondent, it seems to me that the omission was at least careless.

[25] Mr Mullins sought to persuade me that, in any event, a proper case was made out for the need for security because, he submitted, the starting point must be that because the Respondent had made out a *prima facie* case for the existence of a legitimate counterclaim, there was always a need for that counterclaim to be secured because the Respondent could never be assured that it would be able, under all circumstances, to either set-off or deduct its counterclaim from what was owed to the Second Applicant. In this regard, he pointed to what had occurred in the arbitration proceedings relating to the other three vessels. In two of them, interim awards had been made in favour of the Third and Fourth Applicants, respectively, for the amount of their respective claims, less the amount of the counterclaims advanced by the Respondent against them. However, in the case of the Fifth Applicant, an interim award had been made in favour of the Fifth Applicant for the full amount of its claim, without any deduction being made in respect of the Respondent's counterclaims. What had occurred in the case of the Fifth Applicant evidenced the risk which Mr Mullins submitted the Respondent had always faced in connection with all of its counterclaims. The risk was that, in the absence of security awarded to the Respondent for its counterclaim, the

Respondent might be left to face an interim award in favour of one or other of the Applicants, whilst the Respondent's corresponding counterclaim was left still undecided and unsecured.

[26] As events turned out, in the case of the Second Applicant, this risk never came to pass. The arbitrators dealt with the Second Applicant's claim, and the Respondent's counterclaim, together. The Second Applicant was successful and the Respondent's counterclaim was dismissed. That is why the Respondent conceded that it was no longer entitled to preserve the security awarded to it in relation to the Second Applicant. The arbitrator's award was handed down in July 2012 and, in September 2012, the Second Applicant requested the Respondent to agree to an appropriate reduction in the terms of the letter of undertaking which had been provided to the Respondent, pursuant to the arrest. The Respondent did not react, and to this day, the letter of undertaking remains unamended. That is relevant in relation to the subject of costs.

[27] I turn now to deal with the situation as it relates to the "BRAZIL" and the "GRAND OCEAN". In regard thereto, the Third and Fourth Applicants contended that the Respondent had failed to disclose material information in the arrest application because the court was not apprised of the fact that the amounts owed by the Respondent to the Third and Fourth Applicants, respectively, were undisputed, and that the counterclaims advanced against them by the Respondent were smaller than these undisputed claims. Put simply, the situation in regard to the Third and Fourth Applicants was no different to the situation which pertained in relation to the Second Applicant.

[28] The Respondent contended that the position in regard to the Third and Fourth Applicants was in fact different because all the material facts had been disclosed in the document which was annexure "HH" to the arrest papers. It appeared at pages 465 to 505 thereof. That annexure was an affidavit (the "freezing affidavit") filed on behalf of the Third, Fourth and Fifth Applicants in proceedings under which those Applicants sought a worldwide freezing

injunction, in respect of the assets of the Respondent, to secure the claims of those Applicants against the Respondent. The freezing affidavit, the Respondent submitted, disclosed the nature and extent of the claims of those Applicants and the Respondent contended that putting up this annexure fulfilled the Respondent's duty to disclose all the material facts.

[29] Whether proper disclosure of the facts was made needs first to be examined in the context of what the Respondent said in its affidavit in the arrest proceedings, in connection with this annexure. It was referred to near the end of that affidavit and only in the context of pointing out that a worldwide freezing injunction had been issued against the Respondent and that it had been discharged because the Respondent had put up security for the claims advanced by the Third to Fifth Applicants. Nothing was said about the detailed contents of the freezing affidavit and the only reasonable conclusion to draw is that, for the purposes of the arrest application, the Respondent did not dispute the contents of the freezing affidavit. It records a comprehensive history of the claims which arose in favour of the Third to Fifth Applicants, against the Respondent, arising from the respective charterparties and of the efforts to secure payment of the relevant hire charges. It also discloses the history of excuses and explanations given by the Respondent for its failure to pay as well as indulgences given by the various Applicants in regard thereto. What is manifest from the annexure is that, as at 17 June 2011, when the freezing affidavit was deposed, the Third to Fifth Applicants were in fact owed substantial amounts by the Respondent. These were the same claims (increased by the passage of time after 17 June 2011) which the Third to Fifth Applicants advanced in the arbitration proceedings against the Respondent, to which I shall return shortly. It is also plain that those claims were undisputed. The freezing affidavit specifically alleged that those were undisputed and, as I have said, the Respondent did not, in the arrest application, challenge that allegation.

[30] Did the Respondent do enough in the arrest application, to discharge the obligation upon it to disclose all material facts, by making such passing

reference to the freezing affidavit? Is it enough that very relevant facts are recorded in an annexure buried deep within bulky papers placed before the court for urgent hearing? Mr Wragge, for the Applicants, drew my attention to the matter of **Minister of Land Affairs & Agriculture v D & F Wevell Trust** 2008 (2) SA 184 (SCA) at 200. That Court had this to say :-

“It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the Affidavits. The reason is manifest – the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. The position is worse where the arguments are advanced for the first time on appeal. In motion proceedings, the Affidavits constitute both the pleadings and the evidence: **Transnet Limited v Rubenstein** 2006 (1) SA 591 (SCA) and the issues and averments in support of the parties' cases should appear clearly therefrom. A party cannot be expected to trawl through lengthy annexures to the opponent's Affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted”

[31] Mr Wragge submitted that the principle enunciated by the Appeal Court applies with equal force in the present situation. Mr Mullins disagreed. The distinction which Mr Mullins sought to draw was that one is here dealing with whether a party failed to discharge its obligation to disclose material facts and not whether the Respondent, in the arrest application, sought to make out a case based upon allegations made in an annexure to its application.

[32] In my view, the principle set by the Appeal Court is of equal application in the present case. I cannot see why the principle should apply to the case of a Respondent trying to uncover an Applicant's case, but not when the court, on urgent application, is trying to do the same. The application of the principle then gives rise to two consequences. The first is that the Respondent cannot be said to have properly disclosed material facts merely because those facts may be uncovered by a detailed examination of very bulky annexures to the papers. It is the Respondent's duty to draw the court's attention, in the affidavits, to the existence of those facts and where they may be found in the annexures. Secondly, it is too much to expect of any judge to have to “trawl

through” such bulky papers, looking for contradictions in the facts upon which the Respondent sought to rely in justifying the need for security. It was up to the Respondent to deal specifically, in the arrest affidavit, with the facts which emerge from the freezing affidavit and to explain them in relation to its claim that security was genuinely and reasonably required.

[33] I reject the Respondent’s contention that the facts contained in the freezing affidavit were properly disclosed to the court when the arrest application was heard.

[34] Are the facts recorded in the freezing affidavit material and might they have affected the court’s attitude to the arrest application? I believe that question must be answered in the affirmative. As in the case of the “GRAND RODOSI”, the picture which the Respondent painted, in the arrest application, was that it had claims against the Third to Fifth Applicants, which were *prima facie* good claims and which were not yet the subject of arbitration proceedings but would become so. In the Founding Affidavit, nothing at all was said about the fact that there existed claims asserted by those three Applicants, for greater amounts than the Respondent claims, which were undisputed. The correct position was that, in all three cases, arbitration proceedings had in fact commenced in that arbitrators had been appointed and the Respondent knew exactly what claims it was going to face from those three Applicants, all as set out in the freezing affidavit.

[35] The picture painted by the Respondent in the arrest application was that although claims had been asserted by the Third to Fifth Applicants, they were disputed and had been secured, pursuant to the worldwide freezing injunction. As in the case of the “GRAND RODOSI”, the true position was that unless an interim award was made in favour of those Applicants, without deducting therefrom the amount of the Respondent’s counterclaims, there was actually no risk that the Respondent would be left to assert an unsecured claim against an impecunious applicant. It would always be the case that the Respondent would have to pay those Applicants at least something. In my

view, the true position was thus substantially different from the picture painted in the arrest Founding Affidavit and would almost certainly have affected the court's attitude towards the relief sought in the arrest application.

[36] To sum up, the position, as I find it, is that in regard to all four of the vessels against which the Respondent asserted claims, the Respondent failed to disclose material information to the court in the arrest application. Mr Mullins reminded me that, even if I came to that conclusion, I still had a discretion not to set aside the arrest order and in this regard he submitted that because the failure to disclose was inadvertent, any such discretion should be exercised in favour of preserving the arrest. I do not agree, even though, on the facts before me, there can be no inescapable inference that the Respondent's omissions were deliberate. I shall assume that they were not.

[37] However, the extent of the Respondent's oversight is substantial. The true position was quite different to the picture painted in the arrest affidavit. In my view, had the true position been brought to the court's attention, it is probable that the arrest would either not have been granted or, at least, would have been granted upon very different terms. There is no good reason to exercise a discretion in favour of the Respondent.

[38] I accordingly find that, by reason of the Respondent's failure to disclose material information in the arrest application, the arrest order falls to be set aside in its entirety. However, even if the conclusion which I have reached is wrong, there is another basis upon which this application should, in any event, succeed.

[39] That alternative basis has most to do with the issues relating to "GRAND VENETICO", because that is the only vessel in respect of which the Respondent seeks to preserve the security afforded pursuant to the original arrest. However, the principle applies equally in respect of the other vessels. The Respondent's contention was that, even if the matter is viewed from the perspective that the only real risk to which the Respondent was exposed, in

respect of its claims, was that if an interim award in favour of any of the Applicants did not take account (by deduction therefrom) of the Respondent's corresponding counterclaim, the Respondent might be left unable to collect that counterclaim, if it was ultimately successful in any of the arbitrations.

[40] The problem with that contention is that such a case was never advanced in the arrest application. It was only advanced in answer to this application and, even then, only in relation to the Fifth Applicant. In the case of the Second Applicant, the Respondent's counterclaim was dismissed and, in the case of the Third and Fourth Applicants, the interim awards made were for amounts from which the Respondent's counterclaims had been deducted.

[41] Viewing matters as they stood at the time that the arrest order was granted and having regard to the undisputed claims then owed to the various Applicants, I do not accept that the Respondent discharged the onus upon it to show that there was a real and genuine need for security. As I have said, the only case made in the arrest papers was that the Respondent feared that, in current economic times, those parties who might be found liable to the Respondent would be unable to pay. Nothing at all was said about the limited risk which was all that the Respondent actually faced. Nothing was said about the prospect, never mind the likelihood, that an interim award might be made which might leave the Respondent exposed, in respect of its counterclaims, without security to cover them. Nothing was said even about the likelihood of interim awards being sought by the various Applicants and the basis upon which such might be granted. In short, the court dealing with the arrest application, even if it knew the facts, was left completely in the dark as to the nature and scope of the risk which the Respondent faced in regard to the potential non-payment of its claims. I accordingly find that, in any event, the Respondent failed to discharge the onus which vested upon it to establish, on a balance of probabilities, that there was a genuine and reasonable need for security.

[42] On this subject, the Respondent urged me to have regard, not to the situation as it stood at the time that the arrest order was granted, but to matters as they stand now, taking into account all the facts now disclosed in the affidavits in this application. In particular, Mr Mullins contended that I must have regard to the fact that the very risk inherent in the granting of an interim award, in the case of the Fifth Applicant, has in fact come to pass in that such interim award was for the full amount of the Fifth Applicant's claim, without any deduction in respect of the Respondent's counterclaim. In this regard, he referred me to the matter of **Transol Bunker BV v MV Andrico Unity & Others** 1987 (3) SA 794 (C) at 799-800. That case was referred to, with approval, in the matter of the **MV Thalassini** reported at 1989 (3) SA 820 (A).

[43] The principle enunciated in those cases is that, when a court has before it an application to set aside an arrest order of a ship, it remains open to the original applicant for the arrest to justify that arrest upon any ground, whether or not that ground was relied upon when the arrest order was initially obtained. However, the court in the matter of the **Andrico Unity** was careful to point out that this principle was stated in relation to grounds which actually existed at the time that the original arrest was granted and that different considerations would apply if such grounds were something which only came into existence after the original arrest was granted.

[44] In my view, there is no room, in this case, to take the principle any further than those earlier courts did. The Respondent is thus entitled to justify the arrest on any basis which arose from the facts which existed at the time that the application for arrest was first granted. Accordingly, the Respondent cannot rely upon the interim award made in respect of the "GRAND VENETICO" because that award came much later.

[45] The Respondent also emphasised that, if one has regard to the basis upon which the interim award was made in favour of the Fifth Applicant, it is clear that the reason why the arbitrators made an award which did not include a deduction in respect of the Respondent's counterclaim was that they were

made aware that such counterclaim had already been secured in South Africa. It was submitted that it would be most unfair to the Respondent if the Fifth Applicant was thus permitted to rely upon the existence of such security, to obtain a higher interim award in a London arbitration and then, later, contend in South Africa for the setting aside of the security which had been relied upon in London. I think the answer to this lies in the old adage that, having made its bed, the Respondent must now lie in it. When the aforesaid interim award was made, the Respondent knew very well that this application had been made and it was open to the Respondent, in those proceedings, to make the arbitrators aware that the Respondent faced the risk of its security in South Africa being undone if this application was granted. In any event, it was the Respondent that chose the basis upon which it sought to obtain security in South Africa and it has no one else to blame if its case for that security turns out to be a bad one.

[46] In any event, the situation in which the Respondent found itself in the arbitration against the Fifth Applicant serves only to demonstrate the weakness of the Respondent's case for security. What seems probable from the terms of the interim award made by the arbitrators is that but for the existence of the security obtained by the Respondent in South Africa, the arbitrators would have applied what appear to be the usual principles governing such interim awards and, as occurred in the arbitrations involving the Third and Fourth Applicants, an amount equal to the Respondent's counterclaims against the Fifth Applicant would have been deducted from that interim award. In the circumstances, I am not satisfied that the basis of that interim award constitutes a sound foundation upon which to preserve the Respondent's security in relation to the Fifth Applicant.

[47] The case in relation to the Fifth Applicant had another feature which also militates against preserving such security. In this application, the Fifth Applicant contended that, having regard to what the Respondent said in the arrest affidavit, it did not make out even a *prima facie* case for its claim

against the Fifth Applicant. What was said about that claim, in the arrest affidavit, may be summarised as follows :-

- (a) The “GRAND VENETICO” arrived at Dalrymple Bay Coal Terminal on the morning of 2 December 2009 and gave notice of readiness.
- (b) On various occasions between 5 January and 12 January, the Master of the vessel cancelled arrangements for the berthing of the vessel because its winches were inoperable or did not have a power supply.
- (c) Repairs were effected and the vessel was able to berth on 14 January.

[48] These few facts were alleged by the Respondent to give rise to a claim of US\$ 657,313.5, being the “offhire amount” under the charterparty for the period from 2 December 2009 to 12 January 2012. That was the period during which the Respondent alleged that the vessel was unfit to perform its functions.

[49] No explanation is given as to the basis upon which it was alleged that defects in the vessel’s winches rendered it incapable of performing the functions which were apparently required, namely, berthing at the coal terminal. No other functions, which might have been affected, are alleged in the arrest affidavit. No allegations purport to explain why the Respondent’s claim extends to the month-long period between 2 December 2009 and 5 January 2010, during which the vessel apparently had no arrangements to berth. It is not suggested that its failure to berth then arose from any defect in the vessel and one is left to speculate about that position. Assuming that the Master of the vessel gave notice of readiness on 2 December 2009, as alleged in the arrest affidavit, then, *prima facie*, the vessel must have been fully operational at that stage. One is left to speculate as to when the alleged

defect in the winches occurred and under what circumstances repairs were effected at some stage in January 2010 when, perhaps, such repairs could have been effected at a time before the vessel was allocated a berth at the coal terminal. The information alleged by the Respondent is, in my view, just too sparse to conclude, even *prima facie*, that a claim under the charterparty arose for the period alleged by the Respondent. For that reason as well, the arrest order, insofar as it relates to the Fifth Applicant, falls to be set aside.

[50] It follows that the conclusion which I have reached is that, for more than one reason, the original arrest order granted in favour of the Respondent on 5 July 2011 must be set aside. It remains to decide the question of costs.

[51] The Applicants urged me to punish the Respondent with a punitive order for costs because of the way in which it suppressed material facts in the arrest application. It was alleged that the court should show its disapproval for the Respondent's conduct by ordering it to pay costs on the scale as between attorney and client.

[52] It is trite to say that orders for costs are a matter for the court's discretion. In the circumstances which I have outlined in this judgment, I can see no reason why the costs of this application should not follow the result, namely, that they should be paid by the Respondent. What is more, I can see no reason why the Respondent should not be ordered to pay its own costs in relation to the arrest application.

[53] I have already found that there were material facts which the Respondent either failed to disclose, or failed properly to disclose, in the arrest application but I am not convinced that such failure was deliberate. It might have been an oversight in the case of the facts relevant to the bunker's claim against the Second Applicant and what I might term a "judgment call" in relation to the other matters. The fact that that call was the wrong one does not satisfy me that a punitive costs order is appropriate.

[54] In the result, I grant an order in terms of paragraphs 1, 2 and 4 of the Draft Order sought by the Applicants which appears at pages 4 to 6 of the application papers, save that the words “on the scale as between attorney and client” where they appear in paragraph 4 are deleted.

J.C. KING AJ

DATE OF HEARING	2 NOVEMBER 2012
DATE OF JUDGMENT	13 NOVEMBER 2012
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