

In the KwaZulu-Natal High Court, Durban

Republic of South Africa

exercising its Admiralty Jurisdiction

Case No : A112/2011

Name of Ship : MV 'Behice'

In the matter between :

Plaus Shipping Limited

Applicant

and

Augusta Due Srl

Respondent

Judgment

Lopes J

[1] On the 20th October 2011, and pursuant to the provisions of s 5(3)(a) of the Admiralty Jurisdiction Regulation Act, 1983 ('the Act'), I granted an order at the instance of the respondent ('Augusta') for the arrest of the MV 'Behice'.

[2] Augusta's cause of action, and the basis on which I granted that order of arrest, may be summarised as follows :-

- a) Augusta concluded an agreement with Furtrans Denizcilik Sanayi Ve Ticaret AS ('Furtrans') for the construction by Furtrans of a chemical/oil products tanker which was eventually named the MT 'Lido'; and
- b) the agreement and all disputes arising out of it were to be subject to English law and London arbitration proceedings;
- c) disputes arose between the parties, and Augusta cancelled the shipbuilding contract;
- d) the matter was then the subject of arbitration proceedings in London. The arbitrators found in favour of Augusta and ordered that Furtrans repay to Augusta the deposit of € 2 995 000, an amount for which Augusta held security;
- e) the arbitrators reserved the question of liability for the costs of the arbitration in the following terms :-
- f) 'We HEREBY RESERVE our jurisdiction to determine all questions of liability for the parties' recoverable costs and for the assessment of such costs if not agreed.' Augusta confidently expects that award of costs to follow the result, and that it will be awarded costs in due course;
- g) Furtrans then appealed the award in terms of s 68 of the English Arbitration Act, 1996 challenging the award on the grounds of serious irregularity affecting the tribunal, the proceedings or the award;
- h) Furtrans also sought to appeal the award in terms of s 69 of the Arbitration Act, 1996 appealing on a question of law arising out of an

award made in the proceedings;

- i) the appeal in terms of s 69 of the Arbitration Act was dismissed and Furtrans was directed to pay the costs of that hearing to be assessed on what is described as 'the standard basis';
- j) the challenge to the arbitration award in terms of s 68 is still pending before the High Court. However, once again, Augusta expresses confidence that costs will be awarded in its favour;
- k) in the application before me on the 20th October 2011, Augusta sought security for its claims for legal costs on the three bases set out above in the sum of £2 374 426,65. Those costs were calculated on the basis that it was anticipated the Augusta's legal costs would be :
 - (i) no less than £2 200 000 for the arbitration costs; and
 - (ii) no less than £152 286,65 in respect of the two appeal proceedings (the apparent discrepancy of £22 140.00 seems of no consequence, forming as it does, less than one percent of the amount claimed);
- l) it was alleged that the MV 'Behice' was an associated ship of the MV 'Lido' in terms of the Act, and accordingly subject to arrest in terms of s 5(3)(a) to enable security to be provided for Augusta's claims for costs as set out above.

[3] On the 8th November 2011, Plaus Shipping Limited ('Plaus'), the registered owner of the MV 'Behice', brought an urgent application for the setting

aside of the order which I granted on the 20th October 2011. It was agreed between the parties that I would hear argument as to whether, in terms of r 6(12) (c) of the Uniform Rules of this Court, I should reconsider the order which I made on the 20th October 2011. In the event that I found in favour of Plaus on the reconsideration application, that would be the end of the matter and the arrest would be set aside. In the event that I did not do so, further affidavits would be filed, and the matter would become the subject of a further application to set aside the arrest, dealing with the merits, including the question of association, in due course.

[4] Mr *Mullins* SC who appeared for Plaus submitted that the arrest order should not have been granted because :-

- a) an order for an arrest to provide security cannot be made in advance of a claim becoming enforceable in this court. The claim must both have arisen and be enforceable. As at the date of the application there was no contractual or delictual liability for the arbitration costs which have yet to be awarded by the tribunal;
- b) in respect of the s 69 costs which had been awarded by the High Court, they had not yet been quantified;
- c) an action in rem, and accordingly an arrest in terms of s 5(3)(a) of the Act can only be brought by the arrest of an associated ship where the claim is one which 'arose' at the time that the debtor liable in personam (maritime liens aside) was the owner of the ship concerned. Furtrans

were no longer the owner of the ship concerned when the s 68 costs award was made. If the other costs order are awarded in favour of Augusta the same logic would apply.

[5] S 5(3)(a) of the Act provides :-

‘A court may in the exercise of its admiralty jurisdiction order the arrest of any property for the purpose of providing security for a claim which is or may be the subject of an arbitration or any proceedings contemplated, pending or proceeding, either in the Republic or elsewhere, and whether or not it is subject to the law of the Republic, if the person seeking the arrest has a claim enforceable by an action *in personam* against the owner of the property concerned or an action *in rem* against such property or which would be so enforceable but for any such arbitration or proceedings.’

[6] In relation to the costs of the arbitration proceedings, Mr *Mullins* submitted that any claim for costs only comes into existence when the award for costs is made. It is not the same as a claim on the merits, which is confirmed by an arbitration tribunal when it rules that an existing claim has been established or proved. It is created by the award. In those circumstances neither the arbitration costs nor the costs which Augusta seeks in the s 68 High Court proceedings have ‘arisen’ and do not exist as yet. As the claims have not yet ‘arisen’ there can be no question of the enforceability of any such claims.

[7] Mr *Mullins* submitted that as Furtrans ceased to be the owner of the MT 'Lido' on the 8th August 2011, any claim for costs pursuant to the order of the 13th October 2011 (when the High Court refused the application pursuant to s 69 of the Arbitration Act, 1996) could not be enforced against Furtrans and was accordingly not capable of being enforced against an associated ship.

[8] Finally, Mr *Mullins* submitted that the only other provision in the Act which could provide relief for Augusta would be in terms of sub-s 5(2)(b) which provides that :-

'(2) A court may in the exercise of its admiralty jurisdiction –

...

b) order any person to give security for costs or for any claim;

...'

He submitted that this is an ancillary power which, in the absence of a valid arrest, does not exist. A court cannot authorise an arrest in terms of sub-s 5(3) (a) of the Act in circumstances where a claim is not enforceable.

[9] Mr *Shaw* QC for Augusta submitted that a basic principle of the arbitration agreement was that the parties would pay any award for costs and interest and that there was a payment due for the award which was made in favour of Augusta as well as a potential claim for costs. This was catered for in the provisions of sub-s 5(3)(a) of the Act where reference is made to 'a claim which is or may be the subject of an arbitration or any proceedings ...'. He submitted

that this was consistent with the English admiralty procedure where one brings an action in rem and then the defendant asks for relief of the property arrested in exchange for security for arbitration proceedings. When one identifies the proceedings in rem, that is done with regard to the claim together with ancillary claims such as interest and costs. In addition it has always been the practice of this court to grant security for interest and costs. Once a claim succeeded, interest and costs would normally follow. In this matter security had been put up for the main claim and although the costs are reserved, Augusta has every confidence that the costs order will follow the result and they will be successful in obtaining them from the arbitration tribunal and the High Court. Mr *Shaw* pointed to the strong prima facie case in respect of the costs of the main arbitration. The appeal costs in respect of the s 68 proceedings follow from the main arbitration agreement.

[10] Mr *Shaw* submitted that once there is an agreement to pay an arbitration award, the underlying claim for costs exists and is not to be found in the making of the award any more than it would be for an award of damages. It is the original source of the claim which is important, in this case the arbitration proceedings themselves. Once the arbitration proceedings begin the right to costs is potential and is suspended until the order is made which becomes executable upon taxation or agreement.

[11] With regard to the provisions of sub-s 5(2)(b) of the Act he submitted that these provisions were not applicable in the present case because they do not refer to an order for costs not yet incurred and pending elsewhere.

[12] The first aspect which falls to be considered is whether a judgment for costs can, on its own, form the subject of an action, independent and separately from the underlying claim. If a claim for costs cannot stand on its own, an action on that basis is not competent, and no security for such a claim can be sought .

[13] In *Erasmus v Daley & Co* 1912 TPD 465, the appellant appealed against a decision of a magistrate who ruled that it should supply certain further particulars and pay the costs of the hearing. The costs had followed the result. The appeal court held that if the order for further particulars was correct, then the order as to costs was correct. The case was, however, viewed by the appeal court as not being an appeal on the issue of costs, because there was no appeal on the substance of the case – i.e. the order for the provision of further particulars. The appeal accordingly failed.

[14] In *Dhlamini v Jooste* 1925 OPD 223, the plaintiff had objected in the magistrates' court to a plea on the grounds that it did not comply with the relevant requirements. The objection was dismissed with no reference being made to the question of costs. The plaintiff appealed, but on appeal a preliminary objection was taken by the respondent that the order was not an appealable order. It was

then submitted by counsel in the appeal that he was entitled to appeal with regard to the costs. The court held that because the magistrate had said nothing about costs, costs would be costs in the action. The court referred to *Warner v Reid and Others* (1907, T.S. 306) for authority that an order of costs in the cause was a final order and therefore appealable.

[15] De Villiers JP in *Dhlamini* held that an order for costs was a final order and a court, in order to decide an appeal on costs, may have to consider whether the substantive order was correctly made. That does not mean it can set aside the substantive order but could merely enquire, for the purposes of costs, into the legality of the order itself. The court disagreed with the magistrate's reasoning and the appeal against costs was allowed, although the original decision by the magistrate was not overturned because it was not appealable. In conclusion de Villiers JP stated at page 237:-

'I may add that, if the appeal had, *ab initio*, been merely as to the costs, I do not know whether I should have entertained it at the present stage. I might have held that, as the costs were to abide the result of the case, the appeal might more appropriately have been brought after the final determination of the case.'

I do not understand those concluding remarks to suggest that costs on their own cannot stand. Indeed, the contrary appears to be the tenor of the whole judgment because the question of the costs was the only point which the court could consider.

[16] *Erasmus* and *Dhlamini* were then considered in the leading case of *Pretoria Garrison Institutes v Danish Variety Products (Pty) Limited* 1948 (1) SA 839 (A). The majority judgment held that on appeal it is necessary to look at the merits of the matter even where the appeal is only on the question of costs. This could arise in circumstances where, by the time the matter came before the court, the necessity for a costs order had disappeared or because an order on the merits was not made, or was not necessary. Ultimately the decision on the question of costs should not be reached in total isolation from considerations linked to the merits. Watermeyer CJ stated at page 863 :-

'In my opinion the view expressed in *Erasmus v Daley* is wrong and that expressed in *Dhlamini v Jooste* is right. A litigant's right to recover the costs of an opposed application from his opponent will, in general, depend upon whether he was in the right, either in making the application or in opposing it as the case may be (provided always there are no grounds for exercising a judicial discretion to deprive him of these costs). The form in which this rule is usually stated is that the successful party is entitled to his costs unless the Court for good reason in the exercise of its discretion deprives him of those costs. Now, discarding for the moment the idea of a discretion, in an appeal against an order for costs the Court of appeal does not judge a party's right to his costs in the Court *a quo* by asking the question *was he the successful party* in that Court. It asks *ought he to have been* the successful party in that Court and decides the question of costs accordingly. ... the merits of the dispute in the Court below must be investigated in order to decide whether the order as to costs made in that dispute was

properly made or not.’

The learned Chief Justice then continued with an examination of *Erasmus* and at page 864 stated :-

‘The reasoning seems to suggest that the order on the merits and the order for costs are a unity and necessarily bound together in some way, instead of being two separate orders based upon similar reasons.

An appeal against the order on the merits is an application to a superior Court to set aside or vary that order. No such application to set aside the order on the merits can be made in an appeal against the order for costs. Whatever order is made as to costs on the appeal, the original order on the merits stands and the obligation to obey it which is imposed by law on the person against whom it is made stands unimpaired and can be enforced by the party in whose favour it is made.’

[17] Although the appellant in *Pretoria Garrison Institutes* was successful in relation to costs, the original decision by the magistrate for the provision of further particulars stood.

[18] Further authority for the proposition that a costs order is appealable even where the merits of the matter are not, is to be found in *De Vos v Cooper & Ferreira* 1999 (4) SA 1290 (SAC) para [18].

[19] In *First National Bank of Southern Africa Ltd t/a Wesbank v First East*

Cape Financing (Pty) Ltd 1999 (4) SA 1073 (SECLD) the applicant sought an order for the costs incurred by it in respect of the preparation of an application which the applicant intended to institute against the respondent. The application became unnecessary because of a concession by the intended respondent. In limine the respondent challenged the right of an applicant to seek relief for costs (in this case extra judicial costs) which do not fall to be taxed in terms of the rules of the High Court. Citing authority for the proposition that where papers are prepared for an application, but not issued because a demand concerning the matter in dispute is complied with by the other party after the date of the demand, but before the completion of the papers relating to the application, damages amounting to the costs payable by the applicant to his attorney cannot be claimed from the respondent and that the correct remedy is to proceed with the application in regard to costs only, obtain an order in regard thereto and then proceed to tax a bill. At page 1077 marginal letter H – I, Mbenenge AJ stated :-

‘In my view, an applicant who institutes a fresh application in regard to costs and annexes to such application papers the intended application papers is in no different position than the one who proceeds with the application for costs only.’

[20] The learned acting judge also referred to the analogous situation of *Eisenstadt v Barone* 1931 AD 486 where the appellant obtained judgment against the respondents for payment in a specific sum of money and costs. An appeal was noted but not prosecuted. A bill for the appeal costs in the High Court was drawn up, and a notice of taxation given, but the respondent’s attorney

adopted the view that the respondent was not liable for costs. An application was then made to the Chamber Court in Pretoria, presided over by a single judge, for an order of costs. The then Appellate Division considered whether the costs of the appeal were ancillary to, and connected with, the appeal itself, and whether only the court which was competent to deal with the appeal was competent to deal with the costs in connection therewith. The Appellate Division made the point that the merits of the appeal had disappeared but that the Chamber Court was perfectly entitled to deal with the application for costs.

[21] Mr *Mullins* relied upon the matter of *Santam Ltd v Ethwar* 1999 (2) SA SA 244 (SCA) as authority for the proposition that recoverable costs are only determined once the registrar of the court has given his/her allocatur and until then there is no enforceable claim and any endeavour to recover costs by way of action would be met by a successful exception on that basis. That case, however, dealt with an agreement between the parties in terms of which the defendant agreed to pay the plaintiff's costs as taxed or agreed between the parties. As pointed out by the court, the parties had not intended that the respondent could recover costs without a prior agreement or taxation. In my view that situation is distinguishable from the present one. It may well be that no process for execution may issue for the raising of costs awarded by a party until they have been taxed or agreed to in writing (see r 45(2) of the Uniform Rules of this Court) but barring a litigant from obtaining an order for costs (for example to be taxed or agreed later) is a different matter. A dilatory plea to a claim for

payment of a specific sum of costs as yet not taxed or agreed might delay the finalisation of the action, but would not debar the plaintiff from proving his or her claim.

[22] Based on the foregoing authorities there would appear to me to be no reason why Augusta would not have been entitled to institute a claim for costs alone against the owner of the ship. That there exists the uncertainty of whether they will be awarded (both in the arbitration proceedings and in the s 68 appeal) puts Augusta in no different a position than it would have been had it sued for damages which were required to be computed by the arbitration tribunal or a court in due course. No proper evidence was put before me regarding the position in English law, and I accordingly presume it to be the same as our law. (*Banque Paribas v The Fund comprising proceeds of the sale of the MV Emerald Transporter* 1985 (2) SA 452 (O) at 464 C – F)

[23] If Augusta is entitled to institute an action against the owner of the ship concerned for the three categories of costs referred to above, then it is entitled to security for those claims.

[24] Mr *Mullins* further argued that, with regard to the question of association, the associated ship (the MV ‘Lido’) is required to have been owned at time when the action was commenced by a person who was the owner of the ship concerned at the time when the maritime claim arose. As I understand Mr

Mullins's argument it is that the 'Lido' was owned by Furtrans until the 8th August 2011. As the shipbuilding agreement was cancelled on the 12th March 2010 the claim on the merits clearly arose prior to Furtrans disposing of its ownership in the MV 'Lido'. However the costs award only arose, at the earliest, in 2011 when the arbitration tribunal found in favour of Augusta. In respect of the s 68 appeal and the arbitration the claim could be said only to arise when a decision in that regard is made. With regard to the s 69 appeal, that was dismissed with costs on the 13th October 2011.

[25] Mr *Shaw* pointed to the fact that an arbitration agreement existed between the parties in terms of which they clearly anticipated and agreed that one of them may have to pay costs in the event of the merits not being resolved in their favour. He submitted that the right to claim is not to be found in the making of the costs award any more than damages would be. It is found in the original source of the undertaking to pay the costs – i.e. the arbitration agreement.

[26] I agree with this view. The right of Augusta to claim costs is not a right which existed independently of the underlying merits. The existence of the right to claim costs depends upon the existence of an underlying right to approach the arbitration tribunal and/or the High Court in the first place. Those rights arose well before the disposal by Furtrans of the MV 'Lido'. In those circumstances I would not uphold the point that the claim arose after the vessel had been disposed of by Furtrans.

See *Byron v Duke Inc* 2002 (5) SA 483 (SCA), para [7].

[27] In all the circumstances I make the following order :-

- a) save for reducing the quantum of the security to be provided to the sum of £2 352 286,65, the application for reconsideration, in terms of Uniform Rule 6(12) of the grant of the ex parte order made by me on the 20th October 2011, is dismissed;
- b) the applicant in the application for reconsideration, Plaus Shipping Ltd is directed to pay the costs of the application for reconsideration, such costs to include those consequent upon the employment of two counsel.

Date of hearing : 11th November 2011

Date of judgment : 25th November 2011

Counsel for the Applicant : S R Mullins SC (instructed by Shepstone & Wylie)

Counsel for the Respondent : D J Shaw QC (instructed by Edward Nathan
Sonnenbergs)