

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

Case no.: AC 156/2002

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AC 58/2002

In the matter between:

BRIDGE OIL LIMITED

Applicant

and

**THE FUND CONSTITUTING THE PROCEEDS OF
THE SALE OF THE MV “MEGA S” (FORMERLY
THE MV “AKSU”)**

First Respondent

G. O. VAN NIEKERK SC, N.O.

Second Respondent

HAMBURGISCHE LANDESBANK-GIROZENTRALE

Third Respondent

JUDGMENT GIVEN THIS THURSDAY, 12 JUNE 2003

CLEAVER J:

[1] This is an application set down and argued before this court exercising its admiralty jurisdiction under the Admiralty Jurisdiction Regulation Act 105 of 1993 (“the act”).

[2] The issue in this matter is whether the applicant has a claim ranking above the third respondent’s claim against the first respondent which was established pursuant to the sale by judicial auction of the MV “Mega S” (“the vessel”), notwithstanding that the vessel had, after the applicant’s claim had arisen, been sold by judicial sale in Denmark *“free from all charges, liens and other encumbrances”*.

[3] The vessel was initially registered in Turkey under the name MV “Aksu”. The applicant’s claim arises from the supply of bunkers sold and delivered to the vessel in Singapore and China in January and February 2000 by the plaintiff. In April 2000 the applicant obtained an order from the Tuzla Civil Court of the First Instance in Turkey granting a pledge right of USD 298 000,00 on the vessel in favour of the applicant. It was also accepted by the Turkish court that the applicant was entitled to interest calculated at the rate of 2% per month on the capital sum. In August 2000, the applicant caused the pledge to be registered in the vessels’ registry in Turkey. During September 2000, the Hamburgische Landesbank-Girozentrale, the third respondent, the mortgagee in terms of a mortgage granted over the vessel caused the arrest and sale of the vessel in Denmark. According to an affidavit filed by one Michael Villadsen, a qualified lawyer who specialises in maritime law and who deposed to his affidavit as an independent expert on Danish law, the title deed relating to the sale in execution in Denmark reflects that the auction was final and not open to appeal. His affidavit then proceeds as follows:

“When a vessel is sold in Denmark by way of a forced sale, then in terms of section 76, sub-section 1 of the Danish Merchant Shipping Act (of 20 January 1998), all maritime liens, mortgages and other encumbrances cease to attach to the vessel.

This section of the Danish Merchant Shipping Act is based on article 11 of the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, Brussels 1967.”

[4] The sale in execution in Denmark was to Barrington Enterprises SA. This

company did not register the vessel in its name but on-sold it to Mega Navigation Limited ("Mega Navigation"), a Maltese Company. The vessel was then registered in the Ships' Registry in Malta, which reflects Mega Navigation as the owner.

[5] The vessel traded again and in 2002 was arrested in Cape Town at the instance of the third respondent and subsequently sold in execution in terms of an order of this court. The auction having elicited a highest bid which was less than the valuation of the vessel, the sale for the amount bid was confirmed by this court on 13 June 2002 and upon payment of the purchase price the first respondent came into existence. The second respondent is the referee appointed to receive, examine, consider and report to this court on the validity and ranking of claims against the respondent.

[6] The second respondent declined to accept the applicant's claim, which had been filed with him after the expiry of the period within which it was to have been filed. The second respondent does not oppose this application and abides the decision of the court.

[7] The case for the applicant is that its claim, being a pledge right, constituted a charge on the vessel falling within the provisions of section 11(4)(d) of the act. As such the applicant contends that its ranking as against the third respondent's mortgage is to be determined according to the law of the flag of the ship within the meaning of section 11(5)(d) of the act. This subsection reads:

"(5) The claims mentioned in paragraphs (b) to (f) of subsection (4) shall rank after any claim referred to in paragraph (a) of that subsection, and in accordance with the following rules, namely—

...

(d) claims mentioned in paragraph (d) of subsection (4) shall, among themselves, rank according to the law of the flag of the ship;"

Section 11(4) lists the claims contemplated against a fund which has been

established by the sale of a vessel and 11(4)(d) reads:

“a claim in respect of any mortgage, hypothecation or right of retention of, and any other charge on, the ship, effected or valid in accordance with the law of the flag of the ship, and in respect of any lien to which any person mentioned in paragraph (o) *of the definition of ‘maritime claim’ is entitled;*”

- [8] The vessel’s registration in Turkey has not been cancelled, notwithstanding the subsequent sale in execution of the vessel in Denmark and for that reason Mr **Burger**, who appeared for the applicant, submitted that the registration in Turkey continued to determine the law which is to be applied in order to determine the ranking of the applicant’s claim. According to an affidavit filed on behalf of the applicant, the law of Turkey would give precedence to the applicant’s claim over that of the third respondent. Mr **Burger** conceded that the applicant’s case was not based on it having a maritime lien within the meaning of section 3(4)(a) of the act and since immediately prior to the sale of the vessel of the vessel in Cape Town she was owned by a Maltese company and not the applicant’s debtor, section 3(4)(b) also has no application.
- [9] Mr **Burger** submitted that once perfected in the Turkish register, the applicant’s claim became a “*pledge of right*” or “*pledge right*”. This, being somewhat akin to a vindicatory right, was accordingly to be classified as “*any other charge on, the ship effected or valid in accordance of the law of the flag of the ship*” referred to in section 11(4)(d) of the act. However, as pointed out in *Oriental Commercial and Shipping Co Ltd v MV Fidias* 1986 (1) SA 714 (D) at 718B, section 11 of the act is merely a ranking clause. It deals with the consequences and not the

nature of claims. Accordingly, Mr **Stewart**, who appeared for the third respondent, submitted that it was first necessary to have regard to the nature of the applicant's claim in order to establish whether it was entitled to proceed *in rem*. Mr **Burger** took a rather simple line to this, contending that once the applicant had established that the pledge right was akin to a right *in rem*, the onus was on the third respondent to show that that right had been destroyed in some way.

[10] It is clear from the papers that the underlying basis for the applicant's claim as secured by the registration of a maritime lien in Turkey is the sale of three orders of bunkers to the then owners of the vessel. On the clear authority of *Transol Bunker BV v MV Andrico Unity and Others* 1989 (4) SA 325 (A), maritime liens recognised under South African law do not include the claim of a bunker supplier. (p354 at F-I)

[11] Mr **Stewart** submitted that the judgment in *Andrico Unity* effectively disposed of the matter, since what had been registered in Turkey was a maritime lien based on the supply of bunkers. Therefore, even if the applicant's "*pledge right*" is valid under Turkish law and Turkish law is the law of the flag of the ship, a claim against the first respondent is invalid.

[12] Since Mr **Burger** sought to avoid labelling the applicant's claim as a maritime lien (notwithstanding the use of this nomenclature in the Turkish registry), it is necessary to consider the applicant's claim in greater detail, for Mr **Stewart** challenged its validity, even according to Turkish law. The basis for first the lien and then the "*pledge right*" which the applicant claims is article 1235 of the Turkish Commercial Code. According to an article by a Professor Unan of the University of Istanbul attached to the papers, such a right would accrue "*only if the purchase agreement is concluded by the Master who entered into the agreement as the legal representative of the owner. Agreements made directly by the owner do not grant any lien.*" The relevant article of the Turkish Commercial Code follows the wording of article 2(5) of the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages of 1926 to which Turkey is a contracting

state. Article 2 which lists claims which give rise to maritime liens records the following in sub-paragraph 5:

“Claims resulting from contracts entered into or acts done by the Master, acting within the scope of his authority, away from the vessel’s home port, where such contracts or acts are necessary for the preservation of the vessel or the continuation of its voyage, whether the Master is or is not at the same time owner of the vessel, and whether the claim is in his own or that of ship chandlers, and whether the claim is his own or that of ship chandlers, repairers, lenders, or other contractual creditors.”

It is clear that in the case of each of the bunker suppliers, the agreements were made directly with the owners, Merktan Denizeilik AS (“Merktan”) or the managers, Beste Denizeilik Ltd Sti (“Beste”), and not with the Master:

- a) In respect of the first stem, the quote was made by the applicant to Merktan and was accepted by Merktan;
- b) In respect of the second stem, the quote was made by the applicant to Beste and was accepted by Beste; and
- c) In respect of the third stem, the quote was made by the applicant to Beste and was accepted by Beste.

The only answers that the applicant has offered are

- a) The granting of the pledge right and registration thereof were ordered by the Turkish courts and are binding (i.e. *res judicata*); and
- b) The letters of confirmation and the invoices reflect the master of the vessel, amongst others, as the buyer of the bunkers; and the delivery notes bear the vessel’s stamp and the master’s signature.

[13] In my view, this is not a question of *res judicata*. It appears from the judgment of the Tuzla court of first instance that there was no appearance on behalf of the vessel – only the ship’s managers appeared and declared that the amount

claimed by the applicant was correct. They took no part in the proceedings relating to the grant of a pledge right which was left to the court. In the result, the judgment effecting the pledge right was a judgment by default and evidence justifying the judgment may be required by the first respondent. (Section 10A(3)(a)). As to the second answer, it is required that the agreement be concluded with the Master, not that some other person should agree that the Master shall be a party to the agreement or that the Master should acknowledge receipt of the supplies. On the papers before me, the agreement was not concluded with the Master and I accordingly conclude that the applicant has not established the validity of the pledge right.

[14] In passing, I would mention that I am also not convinced that the pledge right establishes a right *in rem*. Even if it is a *quasi-vindicatory* right, it would appear to me to be something less than a right *in rem* and something which does not necessarily attach to the vessel. However, it is not necessary to make a finding on this issue.

[15] If I should be wrong in concluding that the applicant has failed to establish the validity of its contended for pledge right in Turkish law, it will be necessary to consider the law of the flag of the ship, about which I heard considerable argument. The question of course only arises because of the provisions of section 11(4)(d) and 11(5)(d) of the act. As previously indicated, in terms of the *Fidias* judgment section 11(4) cannot be interpreted to mean that the claims mentioned therein are maritime claims or have assumed the characteristics of

maritime liens.

[16] The section only comes into play once the applicant can establish that it had a valid claim recognised in South African law against the vessel immediately prior to the judicial sale in Cape Town. As I have already indicated, the applicant has in my view failed to establish this. If on the other hand it should be held that notwithstanding the fact that the applicant's claim would not be valid against the vessel prior to the sale in Cape Town, but nevertheless valid against the Fund in terms of the law of the flag of the ship, it will be necessary to establish what the law of the flag of the ship is. In my view there can be no doubt that only the law of Malta can be considered to be the law of the flag of the ship when she was arrested and sold in Cape Town the proper law and for the following reasons:

- a) The ship had been sold by judicial sale in Denmark, thereby giving valid title to the buyer free of all charges, liens and encumbrances. A South African court exercising its admiralty jurisdiction in terms of the act is required to apply English admiralty law, including the relevant principles of English private international law, in terms of which governing transfer of moveable property (including ships) is the *lex situs*, that is the law of the place where the property is to be found at the time of the transaction in question. (*Marcard Stein & Co v Port Marine Contractors (Pty) Ltd* 1995 (3) 663 (A) at 667 A-G) Thus, full and valid title of the vessel passed to Barrington Enterprises SA pursuant to the judicial sale in Denmark.

b) The ship was properly and validly registered in the Maltese Registry.

This registration did not require a certificate of deletion from the Turkish Registry as the registration was effected pursuant to a sale by judicial auction.

- c) Article 9 of the 1926 Convention referred to recognises that liens such as that claimed by the applicant can cease to exist following a sale if the sale is *“accompanied by formalities of publicity which should be laid down by the national law”*. All the formalities of publicity laid down by Danish law were complied with. It is clear that the applicant was given notice of the sale in Denmark. It was represented in the Danish proceedings, made no objection to the sale and failed to submit a claim against the fund created from the Danish sale, notwithstanding the opportunity to do so.
- d) Article 5(1) of the 1958 Geneva Convention on the High Seas, to which convention South Africa acceded on 9 May 1963, provides *“ships have the nationality of the state whose flag they are entitled to fly”*. The Mega S flew the Maltese flag and was clearly entitled to fly that flag. Since Mega Navigation is not a Turkish company the vessel would not be entitled to fly the Turkish flag. Furthermore, it would also appear that pursuant to the sale in Denmark the vessel lost its right to fly the Turkish flag as per a decision of the Istanbul 3rd Court Judge and Decree on Behalf of the Turkish Nation, relating to the sale of the MV “Eliki”, a judgment which was confirmed on appeal and referred to in the papers.

- [17] Mr **Burger** sought to overcome these obvious difficulties by contending that
- (a) until the registration in the Turkish registry was cancelled, it applied;
 - (b) the registration in Malta was only provisional; and
 - d) although the vessel was entitled to fly the Maltese flag, the Turkish registration was the primary registration and the Maltese registration should be regarded as a secondary registration.

[18] In my view there is no merit in any of these submissions. The Turkish register is clearly out of date. According to the expert who testified on Maltese law, it is an irrelevant consideration that the former registry in Turkey had not been closed when the vessel was registered in Malta, the reason being that proof of such closure was irrelevant because the vessel was sold by judicial auction. No clearer reason for recognising the title obtained by the buyer of the ship sold in execution can be given than that stated by **Hewson J** in *The Acrux* [1962] 1 Loyd's Report 405 quoted by John Hare in Shipping Law and Admiralty Jurisdiction in South Africa at p111:

"Were such a clean title as given by this court to be challenged or disturbed, the innocent purchaser would be gravely prejudiced. Not only that, but as a general proposition the maritime interest of the world would suffer. Were it to become established, contrary to general maritime law, that a proper sale of a ship by a competent Court did not give a clean title, those whose business it is to make advances of money in their various ways to enable ships to pursue their lawful occasions would be prejudiced in all cases where it became necessary to sell the ship under proper process of any competent Court. It would be prejudiced for this reason, that no innocent purchaser would be prepared to pay the full market price for the ship, and the resultant fund, if the ship were sold, would be minimised and not represent her true value."

The author then goes on to highlight the very problem which has recurred in this case in the following manner:

“Unfortunately, obtaining deletion from a foreign register may not always be quite as clear-cut as Dr Lushington suggests. There are certain jurisdictions in which the registry itself is appointed the collector of fiscal charges levied against the ship or her owners. In Cyprus, for example, there is a tax levied upon the employment of seamen which is collected by the register. Before the Cypriot registrar will issue a certificate of deletion, all outstanding taxes are required to be paid, and it matters not to the registrar by whom payment is made.”

Quite clearly to uphold the applicant’s claim on this basis would undermine the comity of nations and would be contrary to both international and South African public policy. As to the point that the registration in Malta was provisional, that is merely a procedural step in the process of securing registration. The fact is that the vessel is now registered in Malta and flies the Maltese flag. The applicant’s reliance on the possibility of a primary and secondary registration in order to support its submission that the Turkish registration remains effective is ill conceived. The provisions of such registrations are to record the positions of the owner on the one hand (the primary user) and a user, for example, a bare boat charterer. In the present case, we are concerned only with ownership and not with the use of the vessel. Since the law of the flag is not Turkish law, the applicant’s *“pledge right”* cannot be recognised in South Africa.

[19] For all these reasons the application must fail. It is dismissed with costs, including the qualifying fees of the expert witnesses Sema Yerlikaya, Michael Villadsen and Louis Cassar Pullicino.

R B CLEAVER