

**IN THE HIGH COURT OF SOUTH AFRICA
(Cape of Good Hope Provincial Division)**

**REPORTABLE
Case No. AC 128/02**

In the matter between

MEIHUIZEN FREIGHT (PTY) LTD

Applicant

And

**TRANSPORTES MARITIMOS DE PORTUGAL LDA
MAVIGA UK LIMITED
THE SHERIFF OF THE HIGH COURT, CAPE TOWN
NEDCOR BANK LTD**

**First Respondent
Second Respondent
Third Respondent
Fourth Respondent**

In re:

MAVIGA UK LIMITED

**Case No. AC 121/02
Applicant**

And

**TRANSPORTES MARITIMOS DE PORTUGAL LDA
MEIHUIZEN FREIGHT (PTY) LTD**

**First Respondent
Second Respondent**

JUDGMENT DELIVERED 15 NOVEMBER 2002

DAVIS J

INTRODUCTION:

Applicant has acted as a ship's and cargo agent, for the vessel 'Sagittarius' since March 1998. During July 2002 applicant procured second respondent's cargo to be carried on the 'Sagittarius'. The cargo was to be carried from Durban to Lobito, Angola. The owner of the vessel, being first respondent, allegedly breached the contract of carriage in several respects, **inter alia** that the vessel was unseaworthy and unfit for its intended

voyage. Second respondent took the view that, as a result of this alleged breach and consequent total loss of the 'Sagittarius' and its cargo including second respondent's property, it had suffered damages in the amount of the value of the cargo, being Euro 806,130.00.

Second respondent duly paid the freight in the amount of \$124 020.00 to applicant on 17 July 2002, being the agent for first respondent as it was required to do in terms of the contract of carriage. This amount represented freight money which was paid for a carriage which was not performed as the vessel sank and stranded on the voyage. Second respondent received this freight money as agent of first respondent and credited the latter in terms of its accounting practice with the rand equivalent thereof, being R1240 200.00.

On 26 July 2002 second respondent obtained an order from **Nel J** in which the Sheriff of this Court was authorised and directed to attach and arrest the right, title and interest in and to the freight moneys of first respondent held by applicant's bank Nedcor Bank Ltd (fourth respondent) which freight moneys were held for and on behalf of first respondent. The order further provided that

- a) the said attachment is to found and confirm this Court's jurisdiction over the First Respondent for claims which the Applicant intends bringing against the First Respondent in this Honourable Court
- b) That the arrest stands as security for the Applicant's claim against the First Respondent to be brought in Lisbon, Portugal for damages suffered by the Applicant as a consequence of breaches by the First Respondent of the terms and conditions of a contract for the carriage of cargo of maize from Durban, South Africa to Lobito, Angola, which cargo has been lost following the wreck of the

First Respondent's ship mv 'TMP Sagittarius', together with the interest and cost as follows:

- a) Eur 806 130.00;
- b) Interest on the said amount at 15% p.a. for three years;
- c) Costs of R150,000.00'

On 29 July 2002 the Sheriff duly arrested and attached the right, title and interest in the freight moneys in accordance with the order granted by **Nel J.** To make the arrest and attachment effective and to retain control over the money, the Sheriff (third respondent) and Nedbank, the fourth respondent, transferred such money into a separate bank account.

Applicant now has approached the court for relief, framed in the following terms:

'2. That the arrest Order for the arrest and/or attachment obtained (and to the extent that it has been effected) by the Second Respondent in this application (herein referred to as "the Applicant") in terms of, and the relief as provided for in, paragraph 4 of the said Order be discharged and/or set aside;

3. That Applicant and/or the Sheriff of the above Honourable Court (the Third Respondent herein, referred to as "the Sheeriff") and/or Fourth Respondent (herein referred to also as "Nedbank") be authorised and directed to take all such steps as may be necessary, forthwith to:

3.1 Release the monies (in the amount of R1 258 803 ("the monies"), to the extent that it might have been arrested and/or attached in and/or transferred from Second Respondent's account held with Nedcor Bank Ltd, Cape Town with number 100935339 ("the account") by or at the behest or with the cooperation of the Sheriff and/or Applicant and/or Nedbank on or about 29 July 2002, from arrest and/or attachment;

3.2 Restore the monies to the account;

- 3.3 Alternatively to the foregoing, and only in the event of the above Honourable Court finding that moneys in Second Respondent's account equal to the amount found to be due by Second Respondent to First Respondent ("the credit") as at the time of service of the Order on Second Respondent, was subjected to arrest and/or attachment and/or transfer as set out in paragraph 3.1 above, that the difference between the amount of the moneys so transferred and the amount of the credit, be released and restored as set out in paragraphs 3.1 and 3.3 above.

Applicant's Contentions.

Applicant seeks its relief on the basis of a series of contentions being,

- 1) The freight money was mixed with applicant's own money.
- 2) The money was not the property of first respondent and therefore not subject to attachment.
- 3) Third respondent was not entitled to transfer the money.
- 4) The freight money became applicant's because of a cession arrangement.
- 5) Due to cession or set off only an amount of R97 407 was available for attachment.

When the matter was argued, Mr Steenkamp, who appeared on behalf of applicant, concentrated his argument on three bases.

1. First respondent had not instituted **in rem** proceedings against the freight. Instead the Sheriff attached the right to title and interest to freight but not the freight per se.
2. Monies which were attached were not the ownership of first respondent; and

3. Save for R97 000, all the money in this account had been dispersed on behalf of first respondent.

The question of freight.

Mr Steenkamp placed considerable emphasis upon the wording of the notice of attachment as prepared by third respondent pursuant to the order granted by **Nel J.** The notice of attachment provided as follows. ‘The first respondent’s right, title and interest, claim and demand in and to the freight monies held by the second respondent’s bank Nedcor Bank Ltd in account No. 1009-365339. The amount of R1 258 803-00.’

Mr Steenkamp contended that the wording employed by third respondent was indicative that the freight **per se** had not been attached. In submitting that there was a material difference between the existence of right, title and claim to freight and freight **per se** he referred to the judgment of **King J** in **Sunnyface Marine Ltd v Hitoroy Ltd (Trans Orient Steel and another intervening); Sunnyface Marine Ltd v Great River Shipping Inc** 1992(2) SA 653(C).

In **Sunnyface’s** case applicant obtained an order in terms whereof a cargo of approximately 60715 tons of iron ore laden on board a vessel and all the respondent’s right to title and interest therein was attached **ad fundandam et confirmandam jurisdictionem** in an action to be instituted by applicant against respondent for damages and payment of the balance of freight and demurrage allegedly due by respondent to applicant. Before **King J**, applicant sought the confirmation of the attachment. The onus was clearly on applicant to establish, on a balance of probabilities, that respondent had an attachable interest in the cargo. In dealing with the question of respondent’s attachable interest in the cargo, **King J** held ‘That respondent’s so-called right, title and interest, on incorporeal, is something separate and distinct from the corporeal to which the right relates is apparent from such disparate decisions as **Menzies Motor Co (Pty) Ltd v Turkstra** 1955(3) SA 408(T); **Ramdaie v Ganesh and Others** 1959(1) SA 535 (D).... Thus in any event the attachment of a cargo **per se** cannot be justified on the basis that respondent has an interest therein’ (at 656 C).

Mr Steenkamp also referred to Meeson **Admiralty Jurisdiction and Practice** (2nd ed) at 141 where the author concludes that freight cannot be arrested separate from the ship or cargo and so freight which has already been paid to ship owners by the consignees cannot

be arrested. Meeson cites **Kaleten** (1914) 30 TLR 572 in support of this proposition.

On the strength of this authority Mr Steenkamp submitted that no attachment of the freight **per se** had been made. Furthermore there was no legal basis to attach freight once the freight had already been paid to the ship owners by the consignees.

Mr Burger, who appeared on behalf of second respondent, submitted that the ‘paper work of the Sheriff’ as he described the notice of attachment was less relevant to the present dispute than the wording of the order granted by **Nel J.** In paragraph 2 of that order, the Sheriff was authorised to attach and arrest first respondent’s right, title and interest in and to the freight monies held by the second respondent’s bank’ Paragraph 4 of the order provided that the second respondent ‘should advise the Sheriff immediately if freight monies are received on behalf of First Respondent and the Sheriff shall then forthwith arrest or attach such freight monies’. Mr Burger thus contended that the very wording of the order was dispositive of the dispute being that an order had been made out not only to attach the right, title and interest to freight but the money which in effect represented the freight, upon the latter being received on behalf of second respondent.

He also referred to the fact that the second respondent had sought and obtained a security arrest in terms of section 5(3) of the Admiralty Jurisdiction Regulations Act 105 of 1983 as amended (‘the Act’). Section 5(3)(a) provides that 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, in the Republic or elsewhere and whether or not 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 enforced but for any such arbitration or proceedings.

Mr Burger referred to section 3(5) of the Act which provides that an action in rem shall be instituted by the arrest within the area of jurisdiction of the court concerned of

property of one or more of the following categories against or in respect of which the claim lies:

- a) The ship, with or without its equipment, furniture, stores or bunkers;
- b) the whole or any part of the equipment, furniture, stores or bunkers;
- c) the whole or any part of the cargo;
- d) the freight;
- e) any container, if the claim arises out of or relates to the use of that container in or on a ship or the carriage of goods by sea or by water otherwise in that container;
- f) a fund;

Thus on the basis of s 3(5), Mr Burger contended that freight was a form of property recognised by the Act and hence the phrase ‘the arrest of any property’ in section 5(3)(a) had to be taken to include the arrest of freight. In other words, section 3(5) provided an interpretive guide to the concept of property as employed in section 5(3) notwithstanding applicant’s submissions that the arrest had been made pursuant to section 5(3) and not section 3(5) of the Act.

The question therefore arises as to the meaning of freight. Carver **Carriage by Sea** (13th ed) at 1164 defines freight as ‘remuneration payable for the carriage of goods in a ship’. Carver further contends ‘when the contract does not make the payment of freight depend on delivery of goods, as where the payment is to be on shipment, or at a definite period after the ship has sailed, the payment becomes due at the defined time and it continues to be due if not paid, although, owing to the loss of the ship or the goods, it may have become impossible to carry the goods to their destination’. (at 1183).

If the contentions of applicant are accepted, an attachment of freight before the money is paid could never take place. An applicant would only have a right and title to remuneration for carrying the goods in the ship. This right would fructify, for example, upon delivery of the goods or when the contract so provides. But if an applicant, as in the present case, sought an order to attach the right to freight, being the right to the

remuneration, on Mr Steenkamp's line of argument such an attachment would not be possible. Once the obligation to remunerate had been discharged by means of payment to a bank account of the shipowner it would be the bank and not the ship owner who would be owner of the freight and accordingly an attachment order would also not be competent.

Mr Steenkamp's solution was that money, like any other species of property, may be interdicted if it can be shown that the money to be interdicted was identifiable with or earmarked as a particular fund to which the plaintiff claimed to be entitled. See in particular **Stern & Ruskin NO v Appleson** 1951(3) SA 800(W) at 811 F-H. Mr Steenkamp submitted that the bank was the owner of funds in its accounts. In a current account where the account reflect a credit balance, the customer to which the account relates has only a personal claim against the bank for making available the funds in terms of its banker – client relationship.

In **Dantex Investment Holdings (Pty) Ltd v National Explosive (Pty) Ltd (in liquidation)** 1990(1) SA 736(A) at 748 F-H **Milne JA** held that 'the bank is undoubtedly the owner of funds in the (customer's) account.. However he went on to say 'As the bank's customer, **Natex** had a personal claim to any credit balance in the account'.

An argument about the legal ownership of the money must not be allowed to obfuscate the wording of the order or the purpose of s 5(3) of the Act. In my view the order granted by **Nel J** was worded in sufficiently wide terms to permit the attachment of the claim of applicant to the money which is owned by fourth respondent as its banker.

Some support for this conclusion can be found in the word 'fund' in section 3(5)(f) of the Act. A fund is a sum of money held by the Registrar, being the proceeds from the sale of the ship. For this reason a fund could never be the owner of the proceeds in the context employed by Mr Steenkamp. The word 'owner' in relation to the words freight and indeed fund must be given a wider meaning to mean a person entitled to receive the money whether it is 'freight' or 'fund'. In the present case, the attachment is of a claim which applicant has against the bank, being of the funds which are in fourth respondents' account, and to which it (applicant) is entitled.

In my view this approach gives proper and adequate meaning to the word 'freight' as it appears in section 3(5) of the Act, being a category of property which can be attached pursuant to section 5(3)(a) of the Act.

This approach to the attachment of freight finds favour in **Carver** at 1227: 'Thus where proceedings **in rem** are taken against a ship which has carried goods for damage done by her to another vessel, the parties complaining may proceed against the freight as well as against the ship herself; and they may for that purpose arrest the cargo for security until payment is made'.

Significantly, as authority for this proposition Carver cites Roscoe **A Treatise on the Jurisdiction and Practice of the Admiralty Division of the High Court of Justice** (5th ed). In the first edition (1878 which is the only edition available to me) at 124, Roscoe writes as follows:

‘The freight itself cannot be arrested, but when it remains unpaid the cargo can be arrested as representing it (The Leo...). Nor can the cargo be arrested in a damage suit, except as representing freight (The Flora...). But in the usual way of proceeding against the freight is to move the judge to issue an order commanding those from whom the freight is due to pay the money into Court. The freight due on the whole of the cargo at the time a lien attaches is payable as well as on that part which is on board at the time of the arrest’.

This line of argument is reflective of a purposive approach to the attachment of freight. As the resolution of this dispute must be found in the wording of the Act, the use of comparative law must be designed to assist in the interpretation of the Act. In my view, the arguments to be found in Carver and Roscoe add interpretative weight to a conclusion which gives purpose to s 5(3) read with s 3(5) of the Act.

The question of disbursements.

Mr Steenkamp relied upon a **dictum** of **Melunsky J** in **Smith v Daniels and Another** 1997(4) SA 711 at 714 G-H to the effect that any monies that could be attached, are monies which could be identified as money to which the applicant was entitled. See also **Stern and Ruskin NO v Appleson, supra** at 811 G. In short money which is liable to attachment is money to which applicant is entitled. To the extent that first respondent owed amounts which represented disbursements which had been properly incurred by applicant prior to the attachment order, it could not be held that these monies constituted amounts to which first respondent was entitled.

It was common cause that an amount of R750,058.00 was not paid out at the time of the attachment order. Two amounts were however subject to dispute, namely R62,010.00 which was paid out after attachment representing freight commission to applicant which the latter alleged was earned before attachment and a further amount of R18,603 which related to the conversion of dollars to rands.

I deal first with the commission. The monies were remitted in US dollars on 17 July 2002 after the loading of the vessel had been completed. In accordance with an established arrangement and understanding with first respondent in terms of which applicant received a commission of 5% of cargo freight which it secured for first respondent, applicant was entitled to claim and receive commission on receipt by first respondent of payment of freight. Having received the freight payment into its own bank account in terms of this arrangement, applicant was entitled immediately to claim and deduct such commission. The commission amounted to R62,010.

I turn now to the foreign exchange question. On 17 July 2002 applicant was notified by fourth respondent of a remittance from second respondent's agent 'Brewed Product Distribution CC trading as DAS Forwarding in Johannesburg in the amount of US dollars 124 020.00. These funds having been placed at applicants disposal by first respondent in terms of its standing arrangements and after considering its overall US dollar balance and expected dollar liability, applicant instructed fourth respondent to credit the dollars to its US dollar account. Fourth respondent accordingly credited the funds to applicants US dollar account, which at the close of business on 17 July 2002, reflected a credit balance of US dollar 356 029,07.

According to Mr Steenkamp, had applicant chosen instead to sell the dollars to fourth respondent on 17 July 2002 in exchange for South African rands, it would have purchased these dollars at a rate close to its published 'TT buying rate' for that date which was R9.9500 to the dollar. DAS Forwarding, having been placed in funds by second respondent, chose to remit the funds in US dollars to applicant on 17 July 2002. Accordingly, first respondent was credited with R1,240 200.00 on 17 July 2002 at an effective rate of exchange of R10.00 to the US dollar.

The subsequent sale of US dollars in applicant's account, whether applied to disbursements or for other reasons was, in Mr Steenkamp's view, not relevant to first respondent as it had no claim at any time or interest in any funds in applicants US dollar or South African rand account. Rather it had an interest in the net result in South African rand arising from the voyage of the Sagittarius and the balance on the current account of first respondent as reflected in the accounting system of applicant.

The accounting entry reflected receipt of freight to the current account of first respondent at R1 240 200. to which first respondent had not objected. For this reason Mr Steenkamp submitted that the argument by second respondent, that for the purpose of establishing applicants liability to first respondent, the rate of exchange to be applied to the US dollar receipt should be the rate of exchange actually realised when applicant chose to disburse the dollars (period 17 July 2002 to 25 July 2002, 3 amounts disbursed), or when it sold the dollars to Nedbank on 26 July 2002 was not equivalent to the real rate applied to the credit of first respondent's account on 17 July 2002.

In my view, the correct amount was the quantum of rand in the account for the benefit of

first respondent on 17 July 2002. That amount was equivalent to R1 240 200,00. For these reasons therefore the rand amount in the account of fourth respondent to which applicant was entitled was R750,058.00.

COSTS.

In my view, applicant has had some success in this application; it has successfully ensured that over 40% of the attached amount be released. But second respondent has resisted the attack on the balance. It is thus not appropriate to make an award of costs. On the basis of these findings the following order is made:

1. The arrest and/attachment obtained by second respondent on 26 July 2002 in terms of and the relief as provided in paragraph 4 of that order is confirmed, subject to the provisions of paragraph 2 of this order.
2. Applicant and/or the Sheriff of this Honourable Court and/or fourth respondent are authorised and directed
 - 2.1 to take all such steps as may be necessary, forthwith to release the amount of R508 745 from second respondent's account which has been attached and/or transferred from second respondent's account held with Nedcor Limited Cape Town with number 1009365339 by or at the behest of or with the co-operation of third respondent and/or applicant and/or fourth respondent on or about 29 July 2002 from arrest and/or attachment.
 - 2.2 to restore the amount of R508 745 to such account.
3. There is no order as to costs..

DAVIS J

