

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case No: A42/2014

Name of ship: **MV "CECILIA B"**

In the matter between:

GLENCORE INTERNATIONAL AG

APPLICANT

and

**ATAKAS TICARET VE NAKLIYAT AS
RICHARDS BAY COAL TERMINAL (PTY) LTD
THE OWNERS OF THE MV "CECILIA B"**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT**

ORDER

The following order is made:

1. The first respondent is directed to provide security for the applicant's costs in the action commenced by the first respondent, as plaintiff, against the applicant, the second and third respondents, as defendants, under case number A42/2014 in the amount of R1,2 million.
2. The security referred to in paragraph 1 shall be furnished in a form agreed by the applicant and the first respondent, alternatively in a form to be determined by the Registrar.

3. The security shall be furnished within ten days of the date upon which this order is made, alternatively within ten days of the date of determination of the form of security by the Registrar, whichever is the later date.
4. The action commenced by the first respondent against the applicant is stayed until such time as this order is complied with.
5. In the event of the security not being furnished timeously or at all, the applicant is granted leave to make application on the same papers, duly amplified, as may be necessary, for an order dismissing the first respondent's action against the applicant with costs.
6. The first respondent shall pay the applicant's costs of this application on scale B.

JUDGMENT

Sibiya AJ:

Introduction

[1] This is an application in which the applicant, Glencore International AG ('Glencore'), a Swiss company, seeks security for costs from the first respondent, Atakas Ticaret VE Nakliyat AS ('Atakas'), a Turkish company and a plaintiff in an action for delictual damages against Glencore, second respondent and third respondent, as defendants. The application is brought in terms of s 5(2)(b) of the Admiralty Jurisdiction Regulation Act¹ ('the Act'), read with Uniform rule 47. No relief is sought against the second and third respondents.

Background facts

[2] The essential facts giving rise to this application, which are largely common cause, can be summed up as follows. On 18 December 2012 Atakas purchased a consignment of coal from Glencore. On or about 28 October 2013, the vessel MV "Cecilia B" ('the vessel'), owned by the third respondent, "The owners of the MV "Cecilia B" ('the owners') and chartered by Atakas, called at Richards Bay coal

¹ Admiralty Jurisdiction Regulation Act 105 of 1983.

terminal, Kwazulu-Natal, for the purpose of the carriage of coal from the port of Richards Bay to Turkey. The second respondent, Richards Bay Coal Terminal (Pty) Ltd ('RBCT') was responsible for the loading of the coal onto the vessel.

[3] On 30 October 2013, after the coal was loaded onto the vessel, an explosion occurred onboard, causing damage to the vessel and its hatch covers and to part of the consignment of coal. As a result of the explosion, the whole cargo of coal had to be off-loaded and the vessel was precluded from leaving the port of Richards Bay until late in December 2013. Atakas, through its investigations, determined that the loading of heated coal onto the vessel was the cause of the explosion.

[4] On 26 June 2014 Atakas instituted an action in *personam* against RBCT for damages constituting expenses incurred by it as a result of the explosion. On 23 February 2016 'the owners' were joined to the action as the second defendant and on 30 May 2019 and pursuant to a confirmation order by the Supreme Court of Appeal, Glencore was joined as the third defendant. Glencore's application for leave to appeal to the Constitutional Court was unsuccessful. Glencore defends the action and has delivered its plea in which it denies liability for Atakas' loss.

[5] On 03 February 2020 Glencore issued a notice in terms of rule 47 calling for security for its costs in an amount of R1,2 million. The notice was premised on the ground that Atakas is a *peregrinus* of this court with no known assets of value within the Republic of South Africa, and secondly, that Glencore has a genuine and reasonable need for security for its costs.

[6] In response to the notice in terms of rule 47, Atakas' attorneys, on 25 June 2021, sent an e-mail to Glencore's attorneys, tendering a draft bank guarantee to be issued by a Turkish bank, Garanti BBVA for an amount up to USD75.000 to their nominated correspondent bank in South Africa, provided the proposed wording of the bank guarantee was acceptable to Glencore. Atakas advised further that it will revert as soon as it is possible regarding the identity of the nominated correspondent bank in South Africa.

[7] By letter dated 30 June 2021, and before Atakas could provide the details of the nominated correspondent bank, Glencore's attorneys advised that Glencore was

happy with the proposed wording of the draft bank guarantee. Glencore further requested Atakas to consider the possibility of the nomination of either FirstRand Bank or Standard Bank as Garanti BBVA's correspondent bank in South Africa. In addition, it requested Atakas to advise it once the guarantee has been issued and when an original may be collected.

[8] On 01 July 2021, Atakas, through its attorneys, advised Glencore that Garanti BBVA had chosen Absa Bank as its correspondent bank and that Absa had requested the amendment of the wording of the draft bank guarantee by the insertion of the following provision:

'The Guarantor reserves the right to withdraw from this guarantee by giving the Beneficiary 90 (Ninety) days written notice of its intention to do so. All Demands should have been received at the Guarantor's address stated therein on or before the expiry of the notice period. The Guarantor's liability shall cease on expiration of notice whether the guarantee is returned to the Guarantor for cancellation or not. The Guarantor's liability shall cease on expiration of the notice period and no further claims will be considered.'

[9] On 13 July 2021, Glencore, dissatisfied with Absa's proposed wording of the bank guarantee, advised Atakas that the wording of the draft bank guarantee was unacceptable. I find it prudent to quote Glencore's response verbatim, for reasons that will follow later regarding Glencore's assertion that there was a conclusion of a contract between the parties. The e-mail reads thus:

'We refer to your e-mail below of 1 July 2021. Our client has instructed us that it is entitled to security for its costs until such time as the matter is finalised. The proposed wording that Absa seeks to impose on the parties negates this and potentially leaves our client without the agreed security at Absa's whim. In the circumstances we are instructed that our client cannot agree to the proposed amended wording of the agreed terms. We look forward to hearing from you by return.'

[10] Consequent to Glencore's rejection of Absa's proposed amendment, Atakas has not furnished security as demanded in the notice in terms of rule 47, leading Glencore to launch this application on 02 August 2023.

Glencore's contentions

[11] In its application papers Glencore alleges that Atakas had agreed to provide security for its costs however it is now attempting to renege from the agreement. It contends further that it has a genuine and reasonable need for security and would only accept a bank guarantee issued by a South African bank and executable in South Africa. In addition, Glencore has submitted that considerations of fairness, equity and justice dictate that Atakas should be ordered to furnish security for its costs of the action.

[12] With regard to the amount of security to be provided, Glencore has submitted that the amount should not be in issue because Atakas has tendered a bank guarantee up to an amount of USD75.000, which is more than the R1,2 million Glencore seeks in its notice in terms of rule 47.

Atakas' contentions

[13] Atakas denies that there is an agreement for it to provide security for Glencore's costs and contests its liability to provide security. It averred that its tender of the draft bank guarantee was part of negotiations between the parties and those negotiations fell through due to Glencore's rejection of Absa's proposed wording of the bank guarantee, and further the tender was made 'without prejudice' and as such it is inadmissible as evidence in this application.

Issues for determination

[14] The following are issues for determination:

- (a) whether there is an agreement between Glencore and Atakas for Atakas to provide security for Glencore's costs. Should the answer be in the affirmative, this court is relieved from determining Atakas' liability to provide security. However, should the answer be in the negative, the next enquiry is;
- (b) whether Glencore has made out a case that it has a genuine and reasonable need for security for costs.

The agreement

[15] Counsel for Glencore, Mr *Mackenzie*, has submitted that Atakas' tender of the draft bank guarantee, on receipt of the notice in terms of rule 47, was accepted by Glencore and as such there was a conclusion of an agreement between the parties, in the form of an offer and acceptance. He contended further that Glencore's averment that there was an agreement was not denied by Atakas in its answering affidavit and as such Glencore is justified in relying on the agreement made in order to discharge its case. It is however noted that Glencore's submission cannot be sustained because, at paragraph 31 of the answering affidavit, Atakas has submitted that security tendered by Atakas in the form of a bank guarantee to be issued by a Turkish bank has been rejected by Glencore, which insists on a guarantee from a South African bank.

[16] With regard to Atakas' submission that Glencore did not disclose the conclusion of an agreement in its founding affidavit and as such seeks to make out a case in the replying affidavit, Mr *Mackenzie* has submitted that Atakas' argument is misplaced in that, at paragraph 20 of the founding affidavit, Glencore made mention that, following the delivery of the notice in terms of rule 47, Atakas agreed to provide Glencore with security for its costs in the form of a bank guarantee up to a maximum of USD75.000.

[17] Mr *MacWilliam*, acting for Atakas, has submitted that Glencore's argument that there was an agreement for Atakas to provide security for Glencore's costs is misplaced in that it has become common cause that Glencore rejected the wording as proposed by Absa, thus bringing to an end the negotiations.

[18] In order to determine the existence or absence of an agreement between Atakas and Glencore, consideration of the contents of the exchanged letters dated 25 June 2021, 30 June 2021, 01 July 2021 and 13 July 2021 in which the wording of the draft bank guarantee was discussed, as alluded to in paragraphs 6 to 9 above, is necessary.

[19] It is not disputed that Atakas' tender of the draft bank guarantee was conditional on Glencore accepting the terms of the bank guarantee to be issued by a Turkish bank, Garanti BBVA, which had advised that it was yet to appoint its correspondent

bank in South Africa. In response to the letter dated 25 June 2021, Glencore proposed the appointment of either FirstRand Bank or Standard Bank as Garanti BBVA's correspondent bank. Glencore's proposal of the appointment of either of the above-mentioned two banks, in my view, indicates Glencore had acknowledged that the negotiations with Atakas were on-going. When Glencore rejected Absa's proposed wording of the draft bank guarantee, there was no meeting of the minds regarding the terms or wording of the bank guarantee to be issued by Garanti BBVA and as such there was no conclusion of an agreement.

[20] Another indication that Glencore was aware that there was no agreement in existence is the relief it seeks in the notice of motion and repeated in paragraph 11 of the founding affidavit. It seeks an order that security be furnished in a sum of R1,2 million or in such amount as the Registrar shall determine, and further in a form to be agreed by it and Atakas, alternatively to be determined by the Registrar.

[21] The general rule is that no contract can come into existence unless the offer is accepted². AJ Kerr, in *The Principles of the Law of Contract*³, enumerated on the options available to a party on receipt of an offer. He stated that 'the offeree may (1) refuse it; or (2) request further information and / or reserve his position while he considers what to do; or (3) with the offeror's consent, often implied, deal with the matter in stages; or (4) make a counter offer; or (5) accept the offer as it is. He stated further that an offeree who does not wish to contract on the terms offered and does not wish to enter into any further negotiations on it may simply refuse it. If he declines the offer falls away and cannot be accepted later unless it is again proposed by the offeror'.

'Without prejudice rule'

[22] With regards to Mr *MacWilliam's* submission that negotiations between the parties were conducted without prejudice and as such the letters are inadmissible as evidence, Mr *Mackenzie* submitted that there is no request in Atakas' papers for the

² RH Christie *The Law of Contract in South Africa* 85 ed (2022) at 81.

³ AJ Kerr *The Principles of the Law of Contract* 6 ed (2002) at 75.

contents of the letters to be struck out as evidence and therefore there has not been an objection to the admissibility of the letters.

[23] In *Naidoo v Marine and Trade Insurance Co Ltd*,⁴ Trollip JA held that correspondence conducted 'without prejudice' in the bona fide efforts of the parties to settle a claim, is in accordance with the general 'without prejudice' rule, once a party objects to it being adduced as evidence, wholly inadmissible. In the absence of an objection to the admissibility of the letters, the contents of the letters are admissible. No objections to the admissibility of the letters could be found in the answering affidavit. Another consideration in favour of admitting the letters is that Atakas has, at paragraph 31 of the answering affidavit, referred to the same tender as appears in the letters and in addition, at paragraph 41, it has repeated its offer stating that it is still amenable to tendering security from a Turkish bank directly.

Has Glencore discharged the onus that it has a genuine and reasonable need for security?

[24] Having determined that there is no contractual liability for Atakas to provide security for Glencore's costs, the next consideration is whether Glencore has made out a case for security for its costs. Glencore has submitted that it is in the interest of fairness and justice that Atakas be directed to furnish security executable in South Africa in the form to be agreed by the parties or as ordered by the Registrar.

[25] Section 5(2)(b) of the Act empowers a court, in the exercise of its admiralty jurisdiction, to order any person to give security for costs or for any claim. In *MV NYK Isabel: Northern Endeavour Shipping Pty Ltd v Owners of MV NYK Isabel and Another*,⁵ the Supreme Court of Appeal ('the SCA') held that the provisions of s 5(2)(b) confer a wide discretion on the courts to order security for costs, however, for the said discretion to arise, the applicant first has to establish that they may be entitled in due course to an order for costs or that they have a prima facie enforceable claim against a party from whom security is sought, and secondly, that it has a genuine and reasonable need for security.

⁴ *Naidoo v Marine and Trade Insurance Co Ltd* 1978 (3) SA 666 (A) at 677B-C.

⁵ *MV NYK Isabel: Northern Endeavour Shipping Pte Ltd v Owners of MV NYK Isabel and Another* 2017 (1) SA 25 (SCA) para 46.

[26] Rule 47 provides:

- '(1) A party entitled and desiring to demand security for costs from another shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which such security is claimed, and the amount demanded.
- (2) If the amount of security only is contested the registrar shall determine the amount to be given and his decision shall be final.
- (3) If the party from whom security is demanded contests his liability to give security or if he fails or refuses to furnish security in the amount demanded or the amount fixed by the registrar within ten days of the demand or the registrar's decision, the other party may apply to court on notice for an order that such security be given and that the proceedings be stayed until such order is complied with.
- (4) The court may, if security be not given within a reasonable time, dismiss any proceedings instituted or strike out any pleadings filed by the party in default, or make such other order as to it may seem meet.
- (5) Any security for costs shall, unless the court otherwise directs, or the parties otherwise agree, be given in the form, amount and manner directed by the registrar.
- (6) The registrar may, upon the application of the party in whose favour security is to be provided and on notice to interested parties, increase the amount thereof if he is satisfied that the amount originally furnished is no longer sufficient; and his decision shall be final.'

[27] Mr *Mackenzie* has submitted that *Atakas*, by its tender of a draft bank guarantee, acknowledged that *Glencore* may, in due course, be entitled to an order for costs, thus relieving *Glencore* of discharging the onus placed on it.

[28] *Glencore* has submitted, without any substantiation, that *Atakas'* claim for damages is meritless. In response, *Atakas* has submitted that the trial court is bound to find that either one of the three defendants is liable for its loss as a result of the loading of hot coal onto the vessel. In *Silvercraft Helicopters (Switzerland) Ltd and Another v Zonnekus Mansions (Pty) Ltd, and two other cases*⁶ it was held that 'the practice is clearly established that the court will not in applications for security enquire into the merits of the disputes or the bona fides of the parties'. Having said that, it is

⁶ *Silvercraft Helicopters (Switzerland) Ltd and Another v Zonnekus Mansions (Pty) Ltd, and two other cases* 2009 (5) SA 602 (C) para 28.

however not disputed that Atakas, in its action, hopes to pin the liability for its damages on at least one of the defendants. It therefore follows that Atakas has acknowledged that a possibility exists that the trial court may dismiss the claim against Glencore and find against either one of the other two defendants.

[29] Glencore has averred that the following factors evidence that it has a genuine and reasonable need for security:

- (a) Atakas is a *peregrinus* of this court and as such, in the absence of a bilateral agreement between Turkey and South Africa regarding the enforcement of foreign judgments, Glencore will incur further legal costs and expenses in a foreign jurisdiction in an attempt to obtain and enforce a costs order which must first be confirmed by a Turkish court;
- (b) it will be time-consuming for Glencore to enforce its costs order in a foreign jurisdiction; and
- (c) Glencore is at a disadvantage in being obliged to continue with its defence of Atakas's claim in circumstances where the first defendant in the action, RBCT has been furnished with security for its costs, whereas Glencore has not; and further Atakas is in negotiations with the second defendant for the provision of security.

[30] The essence of Glencore's contention, from the above-mentioned factors, is that it would be extremely expensive and time consuming for it to enforce its costs order in a foreign jurisdiction.

[31] Atakas contends that Glencore made no effort, in its founding affidavit, to reveal facts which negated any reasonable apprehension that a costs award would not be paid. It averred that the following factors evidence that Glencore has no genuine and reasonable need for security:

- (a) Glencore did not previously apply or request security at the first available opportunity when the joinder application was launched despite the fact that Glencore's costs in the joinder proceedings were substantial;
- (b) Glencore is aware of Atakas' sound financial status and ability to meet any costs order against it because Atakas, having been established in 1989, is one of the first import coal companies in Turkey having coal importation and packing

facilities with an annual capacity of 2.5 million tonnes of coal which is used throughout Turkey for industrial and heating purposes. Glencore is also aware of Atakas's considerable investments in other industries including steel and port management. Atakas' audited financial statements show that the total shareholders' equity had risen from 804 753 386 Turkish Lira as of 31 December 2021 to 2041 264 835 Turkish Lira as of 31 December 2022, which equates to USD 76 055 890.66;

- (c) Atakas is in a position to satisfy any costs order to be made in favour of Glencore because the amount of costs Atakas will be able to recover from Glencore at the end of the trial, exceeds the amount of security which Glencore seeks as security for costs and as such Glencore will be able to set off the amount of any costs order Glencore should obtain against Atakas, and against the amount which it owes Atakas in terms of cost orders already made by the SCA and the Constitutional Court. The total amount of its bills, inclusive of drawing and taxing fees is R1 202 473.03 and in addition to those are the costs of its correspondent attorneys in both the SCA and Constitutional Court which its cost consultant has advised would be somewhat less than R50 000.00;
- (d) Atakas and its related companies conduct considerable trade with Glencore to the value of between USD50 million and USD100 million per annum and during the 2021 financial year Atakas had purchased from Glencore bulk cargo to the value of USD134 million; and as such Atakas has no intention of jeopardizing the trade relationship by not paying a 'trivial' costs order should it be made in Glencore's favour; and
- (e) To the extent that one defendant may have security, whereas another does not have, is of relevance as between the separate defendants, because any costs order as against those other defendants are irrelevant to Glencore.

[32] In *MV Orient Stride, Asiatic Shipping Services Inc v Elgina Marine Co Ltd*⁷ the SCA in dealing with factors to be considered in the applicant's discharge of the onus that it has a genuine and reasonable need for security held as follows:⁸

'The requirement that the need for security must be "genuine and reasonable" does not appear in the Act. The formulation is that of Didcott J in a separate but concurring judgment in

⁷ *MV Orient Stride: Asiatic Shipping Services Inc v Elgina Marine Co Ltd* 2009 (1) SA 246 (SCA) .

⁸ Ibid para 7.

Katagum Wholesale Commodities Co Ltd v The MV Paz 1984 (3) SA 261 (N) at 270A. It was subsequently endorsed by this court in *Thalassini Avgi* at 833A and in *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) at 583 E - F that the appropriate standard of proof was held to be a balance of probabilities. It is important to observe, however that the requirement does not mean that in every case it must be proved that the party whose property is arrested has or will have insufficient assets to meet a judgment granted against it in the main proceedings. Indeed, more often than not the asset arrested is a ship which has a value far in excess of the claim. What, I think, must be established is a genuine and reasonable apprehension that the party whose property is arrested will not satisfy a judgment or award made in favour of the arresting party. That apprehension may be founded upon actual knowledge of the extent of the assets of the party whose property has been arrested, or, as would more likely be the case, it may be founded on factors giving rise to an inference either that the party in question will be unable to meet the judgment or that it will seek to conceal its assets or otherwise prevent the judgment from being satisfied. The circumstances may also be such, whether for geographic reasons or otherwise, that it would be extremely difficult for the successful party to enforce the judgment. Different considerations will also arise where the party seeking security already has security but arrests property to increase its security... Whether a need for security has been shown to exist or not will depend therefore upon a consideration of the facts of each case.'

[33] It is common cause that, Atakas is a *peregrinus* of this court and is not possessed of assets within the Republic. It was not disputed that Atakas is in a sound financial position and that it conducts considerable trade with Glencore. It is however crucial that Glencore's contention that it will suffer financial hardships and long delays in executing its costs order in a foreign jurisdiction be given due consideration and weight. In *Browns The Diamond Store CC v Van Zyl* it was held:⁹

'So although in this age of globalisation, suing a peregrine in his own jurisdiction to recover costs may be less arduous, the extra burden of costs and delay in enforcing a judgment abroad is an obvious reality that cannot be ignored...'

[34] In considering factors adduced by Atakas, it is noted that even though it disputes its liability to provide security, upon receiving the notice in terms of rule 47, it did not contest its liability or allege that it cannot afford the amount demanded. Instead it offered an amount up to USD75.000 which is more than R1,2 million demanded by

⁹ *Browns The Diamond Store CC v Van Zyl* [2017] ZAGPJHC 70 para 23.

Glencore as security. Its averment that the impediment to providing security is Glencore's insistence on a bank guarantee from a South African Bank, is evidence that it merely contests the form of security to be provided, not affordability.

[35] It is noted further that it is not Atakas' case that it had approached other banks in South Africa for a bank guarantee that would be worded in acceptable terms to it and Glencore. Atakas merely engaged Absa and when negotiations between it and Glencore fell through regarding the wording of the bank guarantee, it refused to provide security alleging that it has no intention of tying funds to a South African bank in circumstances where it is of the view that Glencore has no genuine and reasonable need for security.

[36] In *Silvercraft Helicopters*,¹⁰ it was held as follows:

'It is trite law that the courts have a discretion to grant or refuse an application for security and, in coming to a decision, will consider the relevant facts of each case. Hardship to the peregrinus and financial ability to provide security are taken into account, but are not necessarily decisive. The court should have due regard to the particular circumstances of the case and considerations of equity and fairness to both the *incola* and the non-domiciled foreigner...'

[37] Having regard to the particular circumstances of this case and in balancing the interests of both parties, I find that Glencore has made out a case that it may, in due course, be entitled to an order for costs and that it has a genuine and reasonable need for security. Atakas is a *peregrinus* of this court and does not have assets within South Africa. The probabilities are that Glencore will incur further legal costs and long delays should it have to execute its costs orders in Turkey or a foreign jurisdiction whereas Atakas, as evidenced by its financial statements can afford to provide security for Glencore's costs as demanded without experiencing any hardships. The merits of the disputes in the action or the bona fides of the parties are irrelevant to the current application for security.¹¹

¹⁰ *Silvercraft Helicopters* above fn 6 para 26.

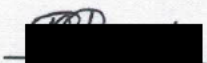
¹¹ *Ibid* para 28.

[38] As regards costs of this application, the general principle that costs follow the event finds application. Having regard to the nature of the issues and the complexity thereof, I find that the issues dealt with were not novel or so complex as to warrant the highest scale of costs as envisaged in rule 67A read with rule 69. I am therefore of the view that a costs order on scale B is warranted.

Order

[39] In the circumstances the following order is made:

1. The first respondent is directed to provide security for the applicant's costs in the action commenced by the first respondent, as plaintiff, against the applicant, the second and third respondents, as defendants, under case number A42/2014 in the amount of R1,2 million.
2. The security referred to in paragraph 1 shall be furnished in a form agreed by the applicant and the first respondent, alternatively in a form to be determined by the Registrar.
3. The security shall be furnished within ten days of the date upon which this order is made, alternatively within ten days of the date of determination of the form of security by the Registrar, whichever is the later date.
4. The action commenced by the first respondent against the applicant is stayed until such time as this order is complied with.
5. In the event of the security not being furnished timeously or at all, the applicant is granted leave to make application on the same papers, duly amplified, for an order dismissing the first respondent's action against the applicant with costs.
6. The first respondent shall pay the applicant's costs of this application on scale B.


SIBIYA AJ

Case Information

Heard on : 12 August 2024
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