

In the High Court of South Africa
(Western Cape Division, Cape Town)
(EXERCISING ITS ADMIRALTY JURISDICTION)

Case No: AC 20/2024

[REPORTABLE]

NAME OF SHIP: **MV “GREY FOX”**

In the matter between:

TI YA TOIVO LTD First Applicant

TIS MANAGEMENT LTD Second Applicant

TRANS HEX SUPPLY SERVICES (PTY) LTD Third Applicant

BELTON PARK TRADING 127 (PTY) LTD Fourth Applicant

and

MV “GREY FOX” First Respondent

CAMISSA STEVEDORING SERVICES (PTY) LTD Second Respondent

HELVETIA CONTAINER LINE, A DIVISION OF FRACHT AG Third Respondent

Admiralty Action *in rem* and *in personam*

Matter Heard: 17 February 2025

Judgment Delivered: 27 March 2025

JUDGMENT

MANTAME, J

[1] The applicants in this application are seeking a declaratory order that this Court has jurisdiction to hear the TI YA TOIVO LTD's (*TYT*) claim against the third respondent (*Helvetia*) in terms of Section 3 of the Carriage of Goods by Sea Act 1 of 1986 (COGSA) and that the action was validly commenced against *Helvetia*. Alternatively, the applicant seeks the joinder of *Helvetia* as the third defendant in terms of Section 5 (1) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (Admiralty Act) as amended.

[2] The applicants brought this application before this Court to ensure that all the parties involved in a cargo claim are present before Court. On 25 September 2024, the applicants as plaintiffs, commenced an admiralty action against the respondents seeking payment of US\$ 28,172,105.18 for damages incurred due to a damaged generator. *Helvetia*, the contractual carrier of the damaged generator, was identified and said to be an undisputable party to the dispute and was therefore cited as the third defendant in that action.

[3] This application was opposed by *Helvetia*, asserting that this Court lacks jurisdiction to adjudicate this claim. In fact, it was said, amongst the applicants, it was only *TYT* who seeks this relief against *Helvetia*. *TYT* seeks to circumvent the terms of the very contract it relies upon for its alleged claim against *Helvetia*. The contract requires that all disputes be determined exclusively by the Hamburg Courts applying German law.

[4] The background facts to this application are that on 05 April 2024, an incident occurred in the port of Cape Town. A generator, carried under a bill of lading issued by *Helvetia* in terms of which *TYT* was the consignee, was dropped into the hold of the first respondent's vessel (the vessel) while being discharged by the second

respondent, Camissa Stevedoring Services. The generator was damaged beyond repair.

[5] The generator was intended to be installed on a diamond mining vessel. The damage to the generator resulted in significant losses for the vessel, TYT, and other applicants. The applicants stated that Helvetia, being a contractual carrier, was the party contractually obliged to deliver the generator to TYT in good order or condition. Helvetia did not fulfil its obligations and ostensibly breached a contract of carriage. This resulted in the applicants commencing an admiralty action against the respondents on 25 September 2024.

[6] The summons alleged that TYT, as the consignee under the bill of lading, may initiate any action concerning the carriage of goods specified in the bill of lading in a competent court in South Africa, in terms of Section 3 of the Carriage of Goods by Sea Act 1 of 1986 in respect of Helvetia. As Helvetia did not have any property within the jurisdiction of this Court, it was not possible for TYT to arrest, or attach assets belonging to Helvetia. TYT proceeded on the basis that Section 3 (1) of COGSA empowered it to pursue litigation in South Africa against Helvetia, regardless of the court's jurisdictional status.

[7] Following the service of summons, Helvetia indicated that it did not accept that Section 3 of COGSA vested this Court with jurisdiction. It is for this reason that the applicants now seek a declaratory order affirming that this Court has jurisdiction to hear TYT's claim against Helvetia, or alternatively, a declaratory order for Helvetia to be joined to the action as the third defendant in terms of Section 5(1) of the Admiralty Act.

[8] Helvetia, in opposing joinder, contended that TYT has made claims without adducing the requisite evidence to demonstrate that it has incurred additional losses arising from physical damage to the cargo for which it seeks to hold Helvetia accountable. In addition, Helvetia stated that TYT is determined to pursue this claim despite having already received compensation from its insurers for the CIP value of the damaged cargo, which includes the contract price, transport costs to Cape Town, insurance, and a 10% uplift. TYT has assigned its alleged claim for that loss to the

underwriter, which has appointed German lawyers and intends claiming against Helvetia in the Hamburg Courts as assignees. Helvetia in the circumstances would be expected to face the same cause of action in two jurisdictions.

[9] In essence, Helvetia stated that Section 3 of COGSA does not confer jurisdiction upon this Court as alleged by TYT. According to Section 3, proceedings can only be commenced in a “competent Court”, being one which exercises jurisdiction properly established in accordance with Section 3 (2) of the Admiralty Act as amended.

[10] Helvetia asserted that TYT, alternatively, is seeking a joinder. It has not made out a proper case for the joinder, as it has failed to demonstrate a *prima facie* case. It has not established the required rights under the contract of carriage pursuant to which the relevant cargo was carried to South Africa. The bill of lading issued on behalf of Helvetia is what is referred to as “straight” bill of lading, and is non-negotiable or transferable sea transport document as defined in Section 2 (2) of the Sea Transport Documents Act 65 of 2000 (STDA). Further, the consequential damages enumerated claims that TYT seeks to advance are excluded by the terms of the contract of carriage relied upon by TYT, and TYT has been indemnified by its insurers in respect of the claim for the physical damage to the cargo. Given the circumstances, even if this Court were to find that TYT has made out a *prima facie* case, it should nevertheless exercise its discretion and refuse the joinder.

[11] Section 3(1) of COGSA reads as follows:

‘3. Jurisdiction of Courts -

(1) Notwithstanding any purported ouster of jurisdiction, exclusive jurisdiction clause or agreement to refer any dispute to arbitration, and notwithstanding the provisions of the Arbitration Act, 1965 (Act No. 42 of 1965), section 7 (1) (b) of the Admiralty Jurisdiction Regulation Act 1983 (Act No. 105 of 1983) and the International Arbitration Act, 2017, any person carrying on business in the Republic and the consignee under, or holder of, any bill of lading, waybill or like document for the carriage of goods to a destination in the Republic or to any port in the Republic, whether for final discharge or for discharge or for

discharge for further carriage, may bring any action relating to the carriage of the said goods or any such bill of lading, waybill or document in a competent court in the Republic.’

[12] TYT submitted that Section 3 (1) of COGSA provides additional statutory jurisdiction. The stipulation that all disputes must be resolved exclusively by Hamburg Courts in Germany was acknowledged without contention. However, it was said that this provision must be interpreted disjunctively, and it therefore applies to either a person carrying on a business in South Africa or the consignee under, or holder of any bill of lading, waybill, or similar document for the carriage of goods to a destination in South Africa or to any port in South Africa¹ (collectively described as “local cargo interest”). Section 3 (1) indicates that local cargo interest, such as TYT, are permitted to bring cargo claims in South Africa.

[13] Helvetia agreed with TYT that this is the first case in which COGSA related issues has arisen in the sense that no cargo claimant has ever contended that Section 3 of COGSA vests an admiralty Court, *ipso facto*, with jurisdiction to determine a cargo claim. In effect, it was stated that TYT complicates what is ordinarily a straight forward issue, and in so doing misses the compelling reason why Professor Hare expresses the views that²:

13.1 The effect of the section is to overrule any exclusive jurisdiction clause in a carriage contract, thereby entitling a local consignee to sue locally for any loss of or damage to cargo landed in South Africa, either as its final destination or for transshipment.

13.2 The section does not create any new jurisdiction but merely preserves the South African Court’s jurisdiction in the face of a contractual ouster. The local Court must still be one of “*competent jurisdiction*”, and the requirements of the Admiralty Act as to jurisdiction and the accompanying arrest or attachment have to be met.

[14] TYT accepted that German law is the chosen jurisdiction by the parties. However, TYT emphasised that it is endowed by the express statutory provision with

¹ The Alka 1994 (4) SA 622 (D)

² John Hare, Shipping Law & Admiralty Jurisdiction in South Africa, 2nd ed, Juta at pages 649-650

locus standi to bring the action before this Court. Effectively, it was contended that this is the legal question that has to be determined by this Court. For instance, it was argued that in *Eskom Holdings Soc Ltd v Vaal River Development Association (Pty) Ltd and Others*³, the Constitutional Court held that:

‘[249] ...a legal issue should only be decided at the interlocutory stage of the proceedings if it would result in the final disposal of either the matter as a whole or a particular aspect thereof.’

[15] Alternatively, TVT submitted that since Helvetia is an indisputable and/or unquestionable party to this dispute, it can be joined in terms of Section 5 (1) of the Admiralty Act. In *The Safmarine Agulhas Merkur Delta Shipping Corporation v Osrām (Pty) Ltd*⁴, it was held that joinder of a party to an action in terms of Section 5 (1) of the Admiralty Jurisdiction Regulation Act (no 105 of 1983) requires demonstration that the plaintiff has a reasonably arguable case that the court has jurisdiction over the party joined and that the plaintiff has a *prima facie* case against that party. The final determination of both aspects is, however, a matter for the trial court.

[16] In quiet a recent decision, *MV Smart: Minmetals Logistics Zhejiang Co Ltd v Owners and underwriters of MV Smart and Another*⁵ (*The Smart*), the SCA had this to say:

‘[21] Following the above approach to interpretation, s 5(1) properly construed, contemplates three possible categories, spatially separated by the word “or” where a joinder may be ordered namely –

- a) where any party to the proceedings has a claim, whether jointly with, or separately from, any other party to those proceedings, against the party to be joined; or
- b) where any party to the proceedings is entitled to the claim a contribution or an indemnification against the party to be joined; or
- c) a person in respect of whom any question or issue in the proceedings is substantially the same as a question or issue which has arisen or will arise

³ 2023 (4) SA 325 (CC) at paras 249

⁴ 2008 SCOSA E176 (D)

⁵ 2025 (1) SA 392 (SCA) para [21]

between the party and the person to be joined and should be determined in such a manner as to bind that person.’

[17] Essentially, it was submitted that the SCA in *The Smart* observed that Section 5 (1) provides extended powers, in the interest of justice and convenience, which would otherwise not be available to a High Court when it is not exercising its admiralty jurisdiction. In fact, it was argued that TYT’s claim falls under category (a) above. In such circumstances, there is no way in which Helvetia would not be included in these proceedings.

[18] On consideration of Section 3(1) of COGSA it appears that the legislature was acutely aware that this provision carefully interpreted, and employing the often quoted *Endumeni*⁶ principles, would be applicable to a person conducting and /or carrying on business in South Africa, as well as to the consignee or holder of a bill of lading even if there is an exclusive law and jurisdiction clause in the bill of lading. The legislature was alive to the fact that the conditions of carriage would be set out in the bill of lading. In my understanding, the conditions as set out in the bill of lading do not oust the provisions of COGSA and or the jurisdiction of this Court. [Emphasis added].

[19] Helvetia contended that the jurisdiction of this Court should be disregarded as the Hamburg Court has exclusive jurisdiction to adjudicate on this claim. In the bill of lading, Clause **25. LAW AND JURISDICTION** reads as follow:

“Except as otherwise provided specifically herein any claim, dispute, suit or proceeding arising under this Bill of Lading and/or the contract between Carrier and the booking party shall be governed by German laws and shall be determined exclusively in the Hamburg courts. Carrier shall have the option to file a suit at Merchant’s place of business.”

[20] This clause suggests that despite the Hamburg courts having exclusive jurisdiction to determine any claim, dispute, suit or proceedings, Helvetia would also

⁶ Natal Joint Municipal Pension Fund v Endumeni Municipality (920/2010) [2012] ZASCA 13; [2012] 2 All 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012)

have had an option to file a suit at a Merchant's place of business, in the event of a dispute and/or a necessity.

[21] It appears that Section 3 (1) of COGSA must be read and understood within its context. Essentially, it authorises the local cargo interest to pursue litigation in South Africa. While the carrier has an option to sue at the Merchant's place of business as stated in Clause 25 above, likewise, Section 3(1) provides the local cargo interest an additional statutory jurisdiction, in addition to the jurisdiction mutually agreed and chosen by the parties for purposes of dispute resolution in their bill of lading. In my mind, the bill of lading and section 3 read together suggests some flexibility in so far as jurisdiction is concerned. In any event, there should be parity of arms in so far as parties to litigation are concerned.

[22] In my opinion Professor Hare's perspectives in paragraph 13.1 and 13.2 seems to be misplaced, as there is no preservation of the South African Courts jurisdiction in the face of the contractual ouster. For instance, a party who incurred damages of a magnitude as alleged by TYT cannot be expected to shoulder the costs of litigating in a foreign jurisdiction at great expense. The option of pursuing litigation in a suitable and competent jurisdiction by a local cargo interest should be an important factor to consider.

[23] I agree with the applicants that local cargo interests have no realistic opportunity, or bargaining power to negotiate the terms of the contracts of carriage. In most circumstances, they are the standard form commercial contracts and, in particular they are signed by only one party and are often drafted in a manner that lacks clarity by that party.⁷ As noted by Wilson: "...the inherent inequality of bargaining power as between parties to a bill of lading contract has necessitated restrictions being imposed on the traditional principle of freedom of contract."⁸

[24] Helvetia contended that Section 3 (1) of COGSA should be cross- referenced with Section 7 of the Admiralty Jurisdiction Regulation Act. Section 7 in my view, is irrelevant in so far as this dispute is concerned. On the other hand, Section 3 (1) is

⁷ William Tetley, *International Maritime and Admiralty Law* (2002) page 117

⁸ John F Wilson, *Carriage Goods by Sea*, 6th edition (2008) page 6

specific with regard to the dispute where it is applicable. It was suggested that Section 3 (1) should refer to a court appropriately endowed or with the admiralty jurisdiction. This Court has no qualms with that suggestion as this Court is fully clothed with such requirements. It was submitted further the local court must still be one of “*competent jurisdiction*”, and the requirements of the Admiralty Act regarding jurisdiction and the accompanying arrest or attachment must be fulfilled. This argument contradicts the fact that cargo claims frequently involve a foreign party which does not possess any assets within the jurisdiction, and therefore renders the accompanying arrest and attachment potentially unfeasible.

[25] In circumstances where it would not be possible to recover damages through the usual methods proposed by Helvetia, the legislature deemed it proper to enact Section 3 (1) of COGSA so as to safeguard, secure and/or protect the local cargo interests. Section 3 (1) is pointedly and distinctly unique. Put differently, it is one of its kind. Tetley refers to it as unashamedly parochial.⁹ It goes without saying that Section 3 (1) of COGSA afforded the local cargo interests with additional rights which they already have under the Admiralty Act. Clearly, there is nothing sinister that the legislature has created in protecting the local cargo interests. This Court has real and substantial connection with the cause of action. The generator was allegedly damaged beyond repair in this jurisdiction. As a consequence thereof the loss suffered by TYT originated from this area of jurisdiction. Helvetia conducts business and trade in South Africa. It derives financial benefits from commercial agreements with local cargo interests.

[26] Notwithstanding Helvetia’s submission that Hamburg courts hold exclusive jurisdiction over this claim, it was confirmed during the hearing that no action has been filed in Hamburg Court. Besides, the one-year time frame for such claims will conclude on 05 April 2025. To date, the action filed under this case number is the only action regarding this claim.

⁹ Tetley describes it as “nationalistic” and (in the footnote) “inward – looking” (pages 110 – 111:” Some national carriage goods by sea statutes have “nationalistic” provisions of jurisdiction and arbitration, notably those of Australia, New Zealand, South Africa, and Nordic Countries, which provisions, unfortunately, restrict party autonomy and damage the uniformity of international maritime law on this important subject.”

[27] Notably, TYT has proceeded against other respondents in pursuit of its claim in this Court. It makes no sense for TYT to proceed in Hamburg Court against Helvetia regarding the same cause of action. In my considered view, it is therefore in the interest of justice practical and convenient for these claims to be adjudicated in this Court. Section 3 (1) empowers local cargo interests the authority to pursue litigation in South Africa. Given the circumstances, I find that this Court has jurisdiction to hear TYT's claim against Helvetia.

[28] In light of this Court's finding in the main, it would not be necessary to deal with the alternative prayer of joinder of the third defendant in terms of Section 5 (1) of the Admiralty Act. However, it is important to state that the applicants have put up a strong and compelling case in this regard – more – so in light of the recent SCA judgment, *The Smart*.

[29] In conclusion, I find that the objections that were raised by Helvetia on jurisdiction are misconceived and have no basis.

[30] In the result the following order is made:

30.1 It is declared that this Court has jurisdiction to hear the first applicant' (TYT's) claim against the third respondent (Helvetia), as set out in the summons under the above case number, in terms of Section 3 (1) of the Carriage of Goods by the Sea Act 1 of 1986;

30.2 The action was validly commenced against the third respondent;

30.3 The third respondent is ordered to pay costs of this application, including the costs of two Counsel on Scale C.

MANTAME J
WESTERN CAPE HIGH COURT

Counsel for the Applicant: ADV MICHEAL FITZGERALD SC
ADV DARRYL COOKE
Instructed by: BOWMAN GILFILLAN INC.

Counsel for the Third Respondent: ADV JAMES MACKENZIE

Instructed by: DAWSON EDWARDS AND ASSOCIATES