

THE REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN
(Exercising its Admiralty Jurisdiction)**

Case number: AC 9 / 2023

NAME OF MOTOR VESSEL: MV “JACKIE O” aka MV “KIARA”

In the matter between:

ARROW CREEK INVESTMENTS 75 (PTY) LTD

Applicant

and

V AND A WATERFRONT HOLDINGS (PTY) LTD

First Respondent

XOLISA ARON NGESI N.O.

Second Respondent

Summary: Leave to Appeal - Interim Relief and Supervisory Relief Refused - Re-Argument of Issues determined on a Factual and Discretionary Basis – Generally - Appellate Court’s Reluctant to Interfere - No *Status Quo* capable of Preservation - Leave to Appeal Refused.

Coram: Wille, J

Heard: 6 November 2025

Delivered: 20 November 2025

JUDGMENT - [LEAVE TO APPEAL]

WILLE, J:

INTRODUCTION

[1] The applicant seeks leave to appeal to the Supreme Court of Appeal against an order of this court (supplemented by 'Reasons') handed down on 10 February 2025 in terms of sections 17(1) (a) (i) and (ii) of the Superior Courts Act, 10 of 2013.¹

[2] In summary, the applicant sought urgent relief in the form of a *rule nisi* for an interim interdict in the following terms:

- (a) that the second respondent be replaced and an *ad hoc* sheriff be appointed to take possession and control of the subject motor vessel.
- (b) that the respondents (and presumably the replaced sheriff) return the motor vessel to a specific jetty (the jetty and berth at which the respondents arrested the vessel) in the precinct controlled by the first respondent.
- (c) that the respondents are interdicted and restrained from accessing and interfering with the motor vessel and its equipment.
- (d) that the respondents be interdicted and restrained from interfering with the duties and functions of the replaced *ad hoc* sheriff.
- (e) that the respondents take all necessary steps to place the motor vessel in the possession and control of the replacement *ad hoc* sheriff and ensure that

¹ Comprehensive reasons were supplied on 20 March 2025.

the *ad hoc* sheriff has access to the specific jetty demanded by the applicant.²

THE CORE GROUNDS OF APPEAL

[3] Firstly, (and somewhat strangely) the applicant complains that an order was granted by the court to its benefit, allowing it to supplement its papers in connection with some of the relief that the applicant sought in terms of the second part (Part B) of its application. The applicant argues that by being granted this opportunity, the court made a positive finding that a legal and factual basis existed for the applicant to pursue its claims in Part B of the application. This ground of appeal is challenging to understand and will be addressed later in this judgment.³

[4] Secondly, the applicant submits that specific incorrect factual findings were made, which resulted in the dismissal of specific relief contended for in Part A, as a ground of appeal. Again, this is challenging to understand because I am unaware of any legal right (whether *prima facie* or otherwise) that obligated the second respondent to return an arrested motor vessel to the berth post its upliftment from arrest. As a matter of pure logic, the second respondent has no control over the availability of berths under the control of the first respondent. The applicant failed to refer to any legal authority (locally or externally) in support of its contention that obligated the second respondent to return an arrested motor vessel to a *specific* berth post its upliftment from arrest.⁴

[5] Finally, the applicant submits that the court was wrong in its finding that the relief sought to remove the second respondent was legally impermissible in the

² This was the primary interim relief sought by the applicant.

³ The court granted an indulgence to the applicant to supplement its papers.

⁴ This was the specific relief which was dismissed in Part A of the application.

circumstances and that an *ad hoc* replacement sheriff should have been appointed. These are the main grounds of appeal and are the only grounds (there are other grounds) which, in my view, need to be dealt with in this judgment. The fact that I have not referred to and discussed the ‘other grounds’ of appeal does not mean that I did not consider them. The three grounds listed herein are the grounds which I believe are worthy of consideration in this judgment.⁵

CONSIDERATION

[6] Dealing firstly with the second ground of appeal. The complaint is about the alleged incorrect factual findings. The applicant initially advanced that some of the material and allegations featured in the first respondent’s preliminary answering affidavit should be given very little probative weight because some allegations contained therein amounted to impermissible hearsay evidence. In response to this, the first respondent took the position that the employment of hearsay evidence in maritime matters is expressly permitted, and the applicant’s reliance on the rules relating to hearsay in this court’s parochial jurisdiction was, therefore, misconceived.⁶

[7] The core argument advanced by the applicant seemed only to be a technical argument. I say this because the deponent to the first respondent’s answering affidavit was correctly authorised to depose thereto, and the applicant did not raise any facts which suggested otherwise.⁷

[8] Because of this, the deponent required no specific discrete authorisation to depose to the affidavit. Regarding the factual findings, the applicant’s initial claim was that the environment would suffer irreparable harm if the current jetty and

⁵ These appeal grounds are in any event inextricably interlinked with each other.

⁶ *Cargo Laden on Board the Thalassini Avgi v The Dimitris* 1989 (3) SA 820 (A) at 841 C to 843 D.

⁷ *Ganes & Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at para 19.

berthing arrangements were to continue. The applicant also demanded that the motor vessel be reconnected to shore power. In addition, the applicant complained that it could not access the motor vessel where it was currently berthed. Finally, several complaints were raised regarding the release of the motor vessel from the first respondent's arrest.⁸

[9] Due to the passage of time (and other issues), the complaints about the possible environmental damage became moot. Additionally, shore power had been restored to the motor vessel prior to the first scheduled hearing. I also say this because the report submitted by the second respondent at the first hearing concluded that the motor vessel was found safely afloat with minimal ingress of water into the bilge since the last onboard visit.⁹

[10] The first respondent explained in detail why it was impossible to return the motor vessel to the berth at the jetty specified and demanded by the applicant. This was so because a large portion of the jetty had been leased for the berthing of other motor vessels, and the remainder had to remain vacant for the routine handling of large motor vessels. This operational and safety requirement formed part and parcel of a contractual obligation imposed on the first respondent in terms of a contractual arrangement concluded between the first respondent and a *bona fide* third party.¹⁰

[11] In opposition, the applicant contended that (according to it) part of the subject jetty was unoccupied. Accordingly, no impediment existed to the motor vessel's

⁸ These were technical arguments about service.

⁹ In late October 2023.

¹⁰ The Port of Cape Town (TPNA).

return to the berth at this jetty pending the outcome of the remainder of the second part of the relief sought.¹¹

[12] The applicant's position was that after the (albeit disputed) upliftment of the arrest at the instance of the first respondent, the applicant had a 'right' to claim that the vessel be returned to the location where the arrest occurred. The applicant then embarks on a criticism of paragraph [38] of my reasons by averring that I confused the issue of a clear right and a *prima facie* right when it concerns the issue of interim relief. What I conveyed in my reasons (or at least intended to convey in my reasons) was the following:

*'...the (final) relief sought here concerns a claim for damages and thus contemplates the institution of action proceedings. I say this because the applicant has not demonstrated a clear right that the motor vessel is to be berthed at the jetty that it demands. The existence of a right is a question of substantive law, and whether that right is "clear" is a matter of evidence...'*¹²

[13] Self-evidently, I am referring to the action proceedings and Part B of the application for final relief. This has less to do with the issues related to the interim relief sought. I used the words final relief, damages and action proceedings in the same sentence to convey that I was referring to Part B of the application.¹³

[14] From my reading of the papers, it appears that the applicant refused to sign a lease with the first respondent. The motor vessel was accommodated only because

¹¹ This was disputed by the first respondent.

¹² I could find no authority for this contention by the applicant.

¹³ It is difficult to understand the applicant's complaint.

it was under arrest, and the second respondent was legally compelled to find a jetty and berth to secure it.¹⁴

[15] As far as I am aware, there is no legal right (*prima facie* or otherwise) for an owner to claim that its motor vessel be returned to the specific place of arrest post upliftment thereof. This is especially true when its alleged lease is in dispute. The applicable maritime rule records, among other things, the following:

*‘...Any property arrested or attached shall be kept in the custody of the sheriff, who may take all such steps as the court may order or as appear to the sheriff to be appropriate for the custody and preservation of the property...’*¹⁵

[16] Significantly, the applicant launched this application more than fourteen (14) months after the motor vessel was last berthed at the preferred jetty (and berth) and five (5) months after the motor vessel had left the precinct controlled by the first respondent.¹⁶

[17] This ground of appeal is entirely fact-driven and merely seeks to regurgitate the issues already traversed in the initial hearing. These fact-based issues have already been determined on a factual and discretionary basis. Thus, this ground of appeal does not commend itself as a genuine ground of appeal.¹⁷

[18] Turning now to the first ground of appeal, which is inextricably linked to the second ground of appeal. The relief sought here concerns a claim for damages and thus contemplates the institution of action proceedings. I say this because the applicant had not demonstrated any right (*prima facie* or otherwise) that the motor

¹⁴ The applicant omitted to pay berthing fees from November 2020 until October 2022.

¹⁵ Admiralty Rule 21 (1).

¹⁶ The vessel moved from Jetty 2 to Quay 7 on 14 April 2023 and to the “TPNA” on 2 February 2024.

¹⁷ It fails to meet the threshold prescribed by section 17(1) of Act, 10 of 2013.

vessel was to be berthed at the jetty that it demanded. The existence of any right (*prima facie* or otherwise) is a question of substantive law, and whether that right is 'clear' is a matter of evidence.¹⁸

[19] Under this rubric, the applicant complains that I permitted it to supplement its papers in connection with, *inter alia*, a portion of the relief it sought. The argument is that, because I granted it this opportunity, I found a positive basis for the applicant to pursue its claims in Part B of the application, based on a legal and factual foundation. This ground of appeal is also challenging to understand. Additionally, this argument cannot be sustained because the two stages of the application are inextricably interlinked.¹⁹

[20] The final ground of appeal is concentrated on the findings in connection with the second respondent. The applicant sought interim relief against the second respondent for, among other things, the following:

- (a) that an *ad hoc* sheriff be appointed to take possession of the motor vessel.
- (b) that the second respondent be interdicted and restrained from accessing or interfering with the motor vessel and the duties of the *ad hoc* sheriff.
- (c) that access be facilitated to the *ad hoc* sheriff to the motor vessel.
- (d) that the second respondent provides an indemnity against any claims that may arise regarding any environmental damage consequent to the second arrest.

¹⁸ Minister of Law & Order, Bophuthatswana v Committee of the Church Submit of Bophuthatswana 1994 (2) SA 89 (BG) at 97 to 98.

¹⁹ I say this because I made no such legal or factual findings in my judgment.

(e) that the *ad hoc* sheriff returns the motor vessel to a specific berth.²⁰

[21] The relief sought by the applicant that an *ad hoc* sheriff be appointed to replace the second respondent and take possession of the motor vessel was challenging to understand. I held the view that only in the clearest of cases will a court interfere with the performance of the statutory duties of the second respondent

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[22] In my view, the applicant's failure to join all relevant parties with vested interests in the appointment of the *ad hoc* sheriff and the removal of the second respondent constituted a non-joinder / misjoinder. Put another way, the applicant failed to join the necessary parties to the application in connection with the relief that it sought. The applicant did not join the proposed *ad hoc* sheriff to replace the second respondent to prevent the second respondent from taking possession and control of the motor vessel.²²

[23] All sheriffs are appointed in accordance with a statutory process. This is so because there is a vested official interest in who is appointed as a sheriff. Before a sheriff is appointed, numerous factors must be taken into consideration. Also, one must consider the issue of enhancing and improving the standard of functions performed by sheriffs.²³

[24] This portion of the relief sought against the second respondent, under the umbrella of interim relief, was final in effect. I say this because if this relief were to

²⁰ At Jetty 2.

²¹ No allegation was made that the "Board of Sheriffs" failed to exercise its statutory powers.

²² The Sheriff for Cape Town West.

²³ The Board of Sheriffs has this function. They were also not joined in this application.

be granted, it would have undermined the court's control over the entire process and effectively determined most of the relief sought in Part B of the application.²⁴

[25] The second respondent acted in accordance with his overall duties and in the best interests of the motor vessel. I say this because, from the date of the second arrest, the applicant and the first respondent were co-arresting parties. Thus, both parties were responsible for the preservation of the motor vessel. The documentary evidence attached to the papers confirmed this billing process. This is precisely why both parties were invoiced for the berthing fees until the release of the second arrest.²⁵

[26] This is, *inter alia*, why I found that the relief sought by the applicant to remove the second respondent as the sheriff concerning the motor vessel and replace him with an *ad hoc* sheriff was legally impermissible. I also found that for this court to do so (in these circumstances) would amount to judicial overreach.²⁶

CONCLUSION

[27] The main complaint by the applicant appears to be that there was a misdirection, resulting from the misapplication of the jurisprudence in the *Spur Steak Ranches* matter. As explained, my approach was that, based on the undisputed facts and the inherently probable facts, no *prima facie* right was established that would warrant the relief being granted. This ground has been dealt with extensively in paragraph [12] of this judgment and needs no further consideration.²⁷

²⁴ This was not materially challenged by the applicant.

²⁵ By the TNPA.

²⁶ The correct process was not followed by the applicant.

²⁷ *Spur Steak Ranches Ltd v Saddles Steak Ranch* 1996 (3) SA 706 (C).

[28] Thus, it is challenging to understand how my findings amounted to a demonstrable and material misdirection that is wrong, which would commend itself to the appeal process of another court.²⁸

[29] There is no sound, rational basis upon which I can conclude that the applicant enjoys prospects of success on appeal. This court may only grant leave to appeal if it believes that the proposed appeal has a reasonable prospect of success.²⁹

[30] The mere possibility of success or an arguable case is not enough.³⁰

ORDER

[31] The following order is granted:

1. The application for leave to appeal is refused.
2. The applicant shall be liable for the costs of and incidental to the application for leave to appeal.
3. These costs shall include the costs of two counsel (where so employed) on scale C and also the legal representatives' costs on Scale C.

E. D. WILLE
(Cape Town)

²⁸ This is because my question was not answered at all.

²⁹ In terms of section 17(1) (a) (i) of the Superior Courts Act, 10 of 2013.

³⁰ MEC for Health, Eastern Cape v Mkhitha [2016] ZASCA 176 (25 November 2016) at para [17].