

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN
(EXERCISING ITS ADMIRALTY JURISDICTION)**

Reportable

CASE NO.: A11/2016

Name of Ship: MV "Smart"

In the matter between:

**THE NATIONAL PORTS AUTHORITY.
A DIVISION OF TRASNET (SOC) LIMITED**

Applicant

and

**THE OWNERS AND UNDERWRITERS
OF THE MV "SMART"**

First Respondent

**MINMETALS LOGISTICS ZHEJIANG CO LTD
(THE CHARTERERS OF THE MV "SMART")**

Second Respondent

JUDGMENT

Olsen J:

[1] This is an application brought by the National Ports Authority (a Division of Transnet (SOC) Ltd) for an order directing the first respondent, the owners and underwriters of the MV "Smart", to produce certain documents and correspondence for the applicant's inspection. Prior requests and discovery notices have not resulted in the production of the documents.

[2] The trial in the action for which disclosure of the documents is required is set down to commence in mid-July 2026, seven months hence, and to run for a little over four weeks. In the interests of preserving the prospect of achieving finality in this much delayed action, I will attempt to confine myself to what appears to me to be strictly necessary when furnishing my reasons for the decisions I have reached. Because of its peculiarities, it is necessary, however, to traverse the history of the present application.

[3] On 19th August 2013 the MV “Smart” was leaving the port of Richards Bay when it ran aground in the vicinity of the harbour entrance. In the result the vessel and its cargo were lost. In the present action the first respondent seeks to recover damages from the applicant of approximately USD 110 million, alleging that the loss of the vessel was caused by negligence on the part of the applicant. Two other actions were instituted against the applicant, one by the charterer of the vessel and the other by the cargo interests, the latter claim relating to the loss of the cargo of coal carried by the vessel at the time.

[4] The charterer of the vessel is the second respondent in the present application. It was joined in this application but has taken no part in it. The action it instituted against the applicant has been withdrawn. The action instituted by the cargo interests is still pursued.

[5] A contention that the loss of the vessel and cargo was caused by negligence on the part of the master and crew is a significant element of the applicant's defence in each of the actions. In the action instituted by the first respondent the applicant has raised an alternative defence of contributory negligence. In the action instituted by the cargo interests the applicant has launched third party proceedings against the owners in which it seeks, on a conditional basis, an order declaring the owners to be joint wrong-doers in relation to the loss in question. (The papers before me do not traverse the issue as to whether, as regards causative negligence, and in accordance with sound legal policy, there should be a consolidation of the two actions for the purposes of trial.)

[6] The first respondent commenced arbitration proceedings in London against the second respondent. An award for substantially the same damages as are claimed

against the applicant in the present action was sought against the second respondent. The first respondent contended that a “safe port warranty” contained in the charterparty had been breached by the charterers because they sent the vessel to Richards Bay to load the cargo of coal. Following the launch of an application in October 2016 by the applicant for the production of documents exchanged in the arbitration, by agreement between the first and second respondents the claim, defence and replying submissions in the arbitration (i.e. the pleadings, in the form they then took) were supplied to the applicant. The defence raised by the second respondent included a contention that the loss was caused by negligence in the navigation of the vessel, and the second respondent denied that the vessel was exposed to conditions in which it was either impossible or very difficult to navigate safely.

[7] In August 2020 the applicant was advised by the first respondent that the arbitration tribunal had found in favour of the second respondent, but that leave to appeal was being sought on certain discreet points. In the result that matter was not yet finalised. However in October 2020, and apparently as a result of its success in the arbitration, the second respondent withdrew its action against the applicant.

[8] As I understand it the only information available to the applicant concerning the award made in the arbitration is what is recorded in paragraph 18 of the judgment of the appeal court in *The Smart* [2022] Lloyd’s Rep. Vol 1, p1.

“In summary, on issues 1 to 4, the tribunal found that the charterers had provided a safe port warranty in respect of Richards Bay and that there were some shortcomings in the running of the port. However, the master had been negligent in his handling of the vessel and it was this that caused the grounding of the vessel; this negligence broke the chain of causation arising from any unsafety of the port.”

[9] Each of the parties in the present action has delivered more than one discovery affidavit. Although the applicant raised some concerns about the proper specification of documents in the first respondent’s discovery affidavits, this application is presented upon the footing that the documents sought feature in the first respondents privileged schedules annexed to its discovery affidavits.

[10] In September 2020 the applicant delivered a notice in terms of Rule 35(3) calling upon the first respondent to disclose what the heading to the notice called "Arbitration related Documents". It related to the London arbitration proceedings between the first and second respondents, and to another London arbitration between the first respondent and the cargo interests. In summary the notice called for the production of:

- (a) the final version of the pleadings;
- (b) the statements of both factual witnesses and expert witnesses (those being the documents presented to the arbitration tribunal as their evidence in chief);
- (c) full transcripts of the arbitration proceedings;
- (d) written submissions submitted to the tribunal (both opening and closing submissions);
- (e) all awards;
- (f) applications for leave to appeal in the arbitration, and associated documents;
- (g) correspondence exchanged between the arbitrating parties, excluding correspondence "of a genuinely without prejudice nature".

In furnishing this summary of the notice I have ignored items which are no longer being pursued in this application.

[11] The applicant also seeks an order for the production of correspondence described in paragraph 9 of the privileged schedule delivered with the first respondent's first supplementary discovery affidavit in November 2018. It is correspondence of the same type as that dealt with in the notice in terms of Rule 35(3).

[12] The papers before me reveal almost nothing, save for its existence, concerning the London arbitration involving the cargo interests.

[13] The response of the first respondent to the Rule 35(3) notice is set out in a lengthy affidavit attested to by the first respondent's attorney, Mr Edwards, who records that he has had sight of all of the documents which are the subjects of the notice. Generally speaking the affidavit advances the propositions that the first respondent would be entitled to resist the production of the documents relying on

privilege, and the confidentiality of the arbitration proceedings. It seems that in some respects these two concepts are wrongly conflated in the affidavit. For instance it is said that transcripts of evidence heard in the arbitration are “privileged”. Having had the benefit of the argument for the first respondent delivered in the present application, I remain uncertain as to why that may be so. Nevertheless, it may be argued that the transcripts might be protected against disclosure by the confidentiality of the arbitration proceedings.

[14] The concession is made in Mr Edwards’ affidavit that a significant portion of the evidence of various witnesses, including expert witnesses, is relevant to both the claim in contract (i.e. the one which served before the arbitration tribunal) and the claim in delict (i.e. the present action). Nevertheless it is contended that the issues in the arbitration and the present action are “fundamentally different”. This latter submission is an overstatement. The question as to whether the charterparty imposed on the charterers a safe port warranty in respect of Richards Bay (which appears to have been decided by the tribunal in favour of the first respondent) is a discreet issue which does not arise in the present action. However the issue as to whether the port is properly regarded as an unsafe port would concern facts and circumstances which, on the face of it, have a bearing on the extent of any duties to be discharged by the applicant regarding the safe departure of vessels from the port. I approach this application upon the basis that the fact that the arbitration involved a dispute over the provisions of the charterparty, whereas the present action does not, constitutes no obstacle to the grant of the relief sought by the applicant.

[15] The central thesis of Mr Edward’s affidavit is that the documents which matter the most, including the expert reports, were prepared by the first respondent not only for the arbitration proceedings, but also for the present action, and therefore fall within the privilege afforded by South African law in the present action. Mr Edwards adds that, additionally, “all of the documents prepared for or arising in the arbitration are subject to an implied undertaking as to confidentiality which exists in all English arbitrations.” The affidavit then proceeds along the following lines.

“11.

Be that as it may, the position of the plaintiffs is that they would be prepared to waive their privilege in respect of most of the requests subject to the timing constraints set out hereunder. This approach is informed primarily because of the practical expedience in favour of doing so.

12.

Because the plaintiffs maintain that the documents and so forth are privileged, they are not obliged to waive privilege and can do so by election in a manner designed to protect the plaintiff's rights”.

[16] Mr Edwards goes on to state that the first respondent will be prepared to waive privilege “subject only to the *caveat* that the said waiver will arise only upon delivery of the defendant's expert reports.” In essence, the reason advanced in the affidavit for that qualification is that the first respondent has a “considerable and real concern” that the applicant “wishes to have sight of the full record in the arbitration in order that its experts can tailor their version and take advantage of the competing versions of the charterers and owners in preparing the case for the [applicant].” (I regard Mr Edwards' choice of words as unfortunate. To say of the evidence of an expert witness that it is “tailored” often, and perhaps usually, means that, to suit the case of the party calling him or her, there has been some deliberate adjustment of or deviation from an honest expression of opinion. I assume that it was not intended to say that.)

[17] The affidavit of Mr Edwards goes on to deal with the obligation of confidentiality attaching to the arbitration proceedings and to record that the charterers have declined to allow the first respondent to make the disclosures, and that the first respondent is compelled to abide by that contractual obligation of confidentiality. He records that the first respondent recognises the “practical necessity of allowing disclosure”, and that the first respondent recognises that this court “is at liberty to grant an order compelling the disclosure”. However, the first respondent asks that such an order should be subject to the timing restriction just referred to.

[18] The applicant was not willing to accept the timing restriction. In addition, recognising that the conditional tender made by the first respondent was subject to the

grant of a court order requiring the disclosure of the documents, the present application was launched in May 2021. The applicant seeks the unconditional disclosure of the documents.

[19] The answering affidavit delivered on behalf of the first respondent does not differ materially from the content of the affidavit of Mr Edwards delivered in response to the Rule 35(3) notice. It was accompanied by a notice of application (subsequently referred to as a notice of counter-application) dated June 2021 seeking the imposition of the condition on any order that the documents be produced, that compliance with the order should be delayed.

[20] In the same notice of application the first respondent sought an order for the joinder of the second respondent in the present proceedings. Its case for the joinder was set out in its answering affidavit, which served also as its founding affidavit in the joinder application.

[21] The second respondent opposed its joinder in the present application. It recorded its adherence to its rights of confidentiality with regard to the arbitration proceedings, but objected to its joinder in this application arguing, in the main, that it was not competent.

[22] The joinder application was successful in this court, which resulted in an appeal by the second respondent to the Supreme Court of Appeal. That court held that the joinder was competent. On the remaining issue, as to whether this court should have directed the joinder, it held that the decision was not appealable. The appeal was struck from the roll. (See *Minmetals Logistics Zhejiang Co Ltd v The Owners and Underwriters of the MV "Smart" and another* [2024] ZASCA 129 (1 October 2024).) Notwithstanding its joinder, and the accompanying order by this court granting the second respondent leave to deliver answering affidavits in these proceedings, the second respondent elected not to do so.

[23] The first respondent delivered an affidavit presented as its replying affidavit in its counter-application. The applicant regarded the position taken in that affidavit as a contradiction of the position adopted by the first respondent in the main application (and indeed in its response to the Rule 35(3) notice). That generated an application

by the applicant to strike out, *inter alia*, the following paragraphs in the first respondent's replying affidavit in the counter-application.

"15.

All that must be said about the main application is that TNPA has not established relevance for any particular document. That is an overarching consideration that must be addressed as logically anterior to any question of privilege or confidentiality.

16.

It is not correct to claim that the owners concede the inevitability of disclosure. The owners had indicated that, solely for practical purposes (and in the hope of avoiding the continuing delays), they would have preferred to waive privilege and confidentiality in the arbitration documents, subject to the timing of production thereof. The owners maintain that, in the absence of waiver, the arbitration documents are subject to privilege and confidentiality and are not compellable.

17.

The counter application is premised on the assumption (self-evidently not conceded by the owners) that the court concludes that it ought to order that the owners make documents from the arbitration available to TNPA. ..."

The applicant's concern that the first respondent had changed its position was borne out by the argument delivered on the first respondent's behalf when this application was heard. Counsel sought the dismissal of this application upon the basis that the relevance of none of the documents had been established; on the basis that the documents are in any event privileged; and on the basis that, in any event, the confidentiality of the arbitration proceedings precludes the disclosure of the documents.

[24] As I understand the argument for the first respondent on the issue of this alteration in its stance, it is based principally on what I would regard as a rule of contract. An offer to produce the documents was made subject to a condition. The

offer was not accepted, and therefore may be withdrawn. I am not convinced that the argument is legitimate. The present proceedings are interlocutory, but the papers nevertheless consist of affidavits which, as in the case of substantive motion proceedings, also stand as the pleadings – they delineate the ambit of the disputes between the parties. In paragraph 17 of the first respondent's replying affidavit in the counter-application (the passage quoted above) it is said that it is self-evident that the owners do not concede that the court ought to order the production of the documents. In my view that is not clear at all. The prayer at the end of that affidavit is that the main application should be dismissed. In contrast to that, the prayer which appears at the end of the answering affidavit in the main application asks the court "to grant the relief set out in the notice of counter-application (first a joinder of the Charterers, and thereafter an order for disclosure subject to timing limitations)." Notwithstanding my misgivings concerning the position adopted by the first respondent, I will deal with the matter upon the basis that what has been done is legitimate.

[25] Before doing so I should state that in my view the decision of the first respondent to approach this case differently to the manner contemplated in the answering affidavit in the main application cannot alter the admissions or concessions made in that answering affidavit, expressly or impliedly. I have in mind in particular the following contents of the affidavit filed by the first respondent in response to the Rule 35(3) notice (annexed to the founding affidavit in the present application), which were not repudiated in the answering affidavit.

- (a) In paragraph 7 it was stated on behalf of the first respondent that whilst the issues for determination in the arbitration and the action are different (i.e. the one involving the dispute over the safe port warranty, and the other not) "a significant portion of the evidence of various witnesses, including the analysis and opinions of expert witnesses, is relevant to both the claims...".
- (b) In paragraph 10 the following is said. "Notwithstanding the fact that there is a clear overlap in the relevance of the evidence, factual and expert, substantial quantities of the documents used in the arbitration are irrelevant..." because they relate to the "unsafe port claim".
- (c) Paragraph 30 read as follows.

“Of course, the plaintiffs recognise the practical necessity of allowing disclosure of documents arising in the arbitration (not least to counter the otherwise inevitable suggestion that the plaintiffs are intent on withholding from the court contradictory statements by their experts *et cetera*) and recognise further that this court is at liberty to grant an order compelling the disclosure.”

The tenders to waive the claimed privilege (and confidentiality) made in the answering affidavit are not accompanied by a protest that any illegitimate advantage will be gained by the applicant through such disclosures, save for the advantage of having access to the documents before the applicant’s expert summaries are prepared and delivered.

Relevance

[26] What is required ordinarily to be discovered in terms of Rule 35(1) is “all documents and tape recordings relating to any matter in question” in the action. Under Rule 35(3), a party who believes that there are documents “which may be relevant to any matter in question in the possession of any party” may call for same to be made available for inspection. As to ambit of the obligation to discover, the following was said by a full court of this Division in *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 563 – 564.

“The question remains whether the documents called to be produced are relevant to any matter in the action. The test for determining this, as laid down in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, has often been accepted and applied in our courts. After remarking that it was desirable to give a wide interpretation to the words “a document relating to any matter in question in the action”, Brett LJ stated the principle as follows:

‘It seems to me that every document relates to the matter in question in the action which, it is reasonable to suppose, contains information which *may* – not which *must* – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of its adversary. I have put in the words “either directly or indirectly” because, as

it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences.”

I suggest that, inter alia, the provisions of sections 32 and 34 of the Constitution support the desirability of giving a wide interpretation to the words used in the rules to delineate the scope of the obligation to make discovery and produce documents for inspection. (With regard to the scope of the obligation to discover I refer to *MV Alina II : Transnet Limited v MV Alina II* 2013 (6) SA 556 (WCC) at paragraphs 19 to 24, and the cases referred to therein.)

[27] Given the close relationship between the issues decided and placed before the tribunal in the London arbitration between the first and second respondents (which are presumably mirrored in the arbitration involving the cargo interests), and given also what Mr Edwards has had to say about the relevance of at least the most prominent portions of the documents sought by the applicant, I am satisfied that relevance has been established. Of course, when it comes to the discovery of correspondence, there is always the problem that not all of it turns out to be relevant. I will revert to this issue.

[28] Assuming relevance, the first respondent resists an order for the production of the documents relying on both the confidentiality of arbitration proceedings and the doctrine of privilege. Given the argument advanced for privilege, I find it necessary to deal first with the issue of the confidentiality of the arbitration proceedings.

Confidentiality

[29] The law applicable to the conduct of the arbitration between the first and second respondents is the law of England and Wales. On the subject of the English law concerning the confidentiality of arbitration proceedings, I have been referred to *Ali Shipping Corp v Shipyard Trogir* [1998] 2 All ER 136, a decision of the Court of Appeal, Civil Division. At pages 146 to 147 of the report of the judgment, Potter LJ gives an account of the nature of the confidentiality which is a feature of arbitrations in England. It derives from the fact that parties have agreed to submit to arbitration the

particular disputes which arise between them, and only between them. Strangers must be excluded from the hearing and the conduct of the arbitration. The principle does not cover merely the hearing. It covers also “pleadings, written submissions, and the proofs of witnesses as well as transcripts and notes of the evidence given in the arbitration...”. It also covers the award. At page 146 the learned Judge stated that he considered

“that the implied term [as to confidentiality] ought properly to be regarded as attaching as a matter of law. It seems to me that, in holding as a matter of principle that the obligation of confidentiality (whatever its precise limits) arises as an essential corollary of the privacy of arbitration proceedings, the court is propounding a term which arises ‘as the nature of the contract itself implicitly requires’...”.

[30] The learned Judge listed (at page 147 to 148) five exceptions to the broad rule of confidentiality of arbitration proceedings.

- (a) Consent.
- (b) An “order of the court, an obvious example of which is an order for disclosure of documents generated by an arbitration for the purpose of a later court action”.
- (c) On leave of a court being granted (the learned Judge noting that the grounds on which such leave might be granted give rise to difficulty).
- (iv) Disclosure “when, and to the extent to which, it is reasonably necessary for the protection of the legitimate interests of an arbitrating party. In this context that means reasonably necessary for the establishment or protection of an arbitrating party’s legal rights *vis-a-vis* a third party in order to found a cause of action against that third party or to defend a claim (or counterclaim) brought by the third party...”.
- (v) Where the “public interest” requires disclosure. In this regard the learned Judge referred to the judgment of Mance J in *London and Leeds Estates Ltd v Paribas Ltd* (No. 2) [1995] 1 EGLR 102 as “tentatively” recognising the fifth exception. In that case Mance J observed as follows.

“If a witness were proved to have expressed himself in a materially different sense when acting for different sides, that

would be a factor which should be brought out in the interests of individual litigants involved and in the public interest”.

Potter LJ continued as follows.

“It seems to be clear that, in that context, Mance J was referring to the “public interest” in the sense of “the interests of justice”, namely the importance of a judicial decision being reached upon the basis of the truthful or accurate evidence of the witness concerned.”

[31] The second and the fifth of these exceptions, and perhaps the fourth one as well, are of significance in the present matter. It is uncontested that the present action, and the associated obligations to discover and make available documents for inspection, are regulated by South African law. The second of the exceptions reflects the fact that if South African law requires disclosure of the documents sought by the applicant, the rule of confidentiality attached by English Law to the arbitration proceedings would not thereby be breached or undermined. South African law grants no licence to a witness to give evidence in a South African court at variance with evidence he has given under oath on the same subject on an earlier occasion, free of the liability to be challenged on those discrepancies. No South African trial lawyer would or should, save in exceptional circumstances, enter into the cross-examination of such a witness without access to the transcript of that witness’s evidence in the earlier proceedings. In the ordinary case that poses no difficulty, as the evidence would have been furnished in open court, and would be a matter of public record.

[32] In *Emmott v Michael Wilson & Partners* [2008] 1 Lloyd’s Rep 616, a judgment of the Court of Appeal (Civil Division), at paragraph 127, Collins LJ dealt with how an English court would deal with the problem of disclosure of material generated in private arbitration proceedings, in subsequent court proceedings between one of the arbitrating parties and a stranger.

“In determining whether there has to be disclosure in the litigation it will have regard to the ambit of the obligations of privacy and confidentiality between the parties to the arbitration agreement (whether express or implied), but can compel disclosure notwithstanding any such terms. As the decisions show, the courts of England and Wales pay high regard to the obligations of privacy and

confidentiality of arbitrations when considering whether to order disclosure. However the courts are ultimately no more bound to give effect to the agreement of the parties than they are to give effect to obligations of privacy and confidentiality that arise by agreement between the party to litigation and the non party in other contexts. There is a balancing exercise in which the exercise of the court's judgment (often referred to as a discretion) may ultimately turn on balancing the obligations of privacy and confidentiality between the parties to the arbitration as against the public interest of disclosure of documents in litigation."

[33] For the Australian Law on the subject I was referred to *Esso Australia Resources Ltd and others v The Honourable Sidney James Plowman and Others* (1995) 128 ALR 391. The main, and informative, judgment was written by Mason CJ. For present purposes, merely for convenience sake, I refer to two passages from the concurring judgment of Brennan J as they set out the position in that country concisely.

"For the reasons which the Chief Justice gives, I agree that, when one party produces documents or discloses information to an opposing party in an arbitration that is to be heard in private, the documents or information are not clothed with confidentiality merely because of the privacy of the hearing. Nor does the use of a document in such proceedings make the document confidential. I agree also that absolute confidentiality of documents produced and information disclosed in an arbitration is not a characteristic of arbitrations in this country." (Paragraph 1.)

"Where a party is in possession of a document or information and is under a duty at common law or under statute to communicate the document or information to a third party, no contractual obligation of confidentiality can prohibit the performance of that duty. Moreover, a party may be under a duty, not necessarily a legal duty, to communicate documents or information to a third party who has an interest in the progress or outcome of the arbitration." (Paragraph 4.)

[34] It seems to me that the position in South African Law is as simply stated in *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at para 17, where, with reference to the authorities set out in note 19, the following proposition is stated.

“The fact that documents contain information of a confidential nature ‘does not per se in our law confer on them any privilege against disclosure’”.

[35] The *MV Alina II* (supra) also concerned the production for purposes of South African litigation of documents emanating from a London arbitration where, after a helpful and detailed examination of foreign authorities on the subject, Goliath J held that the respondent in that case should not be “allowed to use the cloak of confidentiality to withhold documents relevant to a case in a different jurisdiction, where the case raised the same or similar allegations, and where same is pleaded by the respondent. Maintaining secrecy around the arbitration and other proceedings ‘arising from the same incident’ undermines the search for the truth in adjudicating the matter.” The learned Judge added that she abided by the statement of Lord Denning in *Riddick v Thames Broad Mills Ltd* [1977] 3 All ER 677 (CA) at 687.

“The reason for compelling discovery of documents in this way lies in the public interest in discovering the truth so that justice may be done between the parties. That public interest is to be put into the scales against the public interest in preserving privacy and protecting confidential information. The balance comes down in the ordinary way in favour of the public interest of discovering the truth, i.e. in making full disclosure.”

[36] Counsel for the first respondent argues that the position here is actually governed by the International Arbitration Act, 2017. He relies upon s11(2) of Schedule 1 to the Act, which provides as follows (the emphasis being mine).

“Where the arbitration is held in private, the award and all documents created for the arbitration which are not otherwise in the public domain must be kept confidential by the parties and tribunal, **except to the extent that the disclosure of such documents may be required by reason of a legal duty or to protect or enforce a legal right**”.

Counsel submits that the highlighted portion relates only to the enforcement or protection of a legal right on the part of a party to the arbitration, and that the exception

does not operate for the benefit of a third party such as the applicant is in these proceedings. I can say no more than that no construction of the highlighted words supports that submission. If it was intended that the legal rights or duties were to be confined in that fashion, that would have been said. Instead the indefinite article was used. It conveys that no restriction of the legal rights which are the subject of the exception was contemplated.

[37] In my view it needs to be stressed that the confidentiality relied upon by the first respondent is a phenomenon which is a creation of two private parties to serve their own interests. The recognition of confidentiality as an implied term in English Law means no more than that the term will be deemed to exist if the contract is silent on the question. The parties are free to contract upon the basis that there will be limited, or no confidentiality. Recognising that, without more, the mere existence of that term obstructs the enforcement of South African procedural law on the subject of discovery and disclosure, is to recognise an arbitrary restriction upon the fair trial rights of parties embodied in our law relating to discovery and disclosure. I say "arbitrary", because there is no requirement attached to the imposition of a term of confidentiality on arbitration proceedings, that there should actually be something worthy of protection - a protectable interest which might be harmed or undermined by public consumption. If the balancing exercise which would be required of an English Court in circumstances like the present, is one which a South African Court is also obliged to conduct, then, in my view, the decision must undoubtedly come down in favour of disclosure. The judgment in *Crown Cork and Seal Co Inc and Another v Rheem South Africa (Pty) Ltd and Others* 1980 (3) SA 1093 (W) may be regarded as authority for the proposition that such a balancing exercise is competent in South African courts, but that case concerned protectable proprietary interests. Neither the first nor second respondent has relied upon the inherent confidentiality of any of the material in question in the present case. Despite being joined, the second respondent has not even put up an opposing affidavit. (It relied in its opposition to its joinder merely on the fact that the first and second respondents contracted with one another upon the footing that their arbitration would be regarded as confidential.)

[38] I conclude that the first respondent's claim that the confidentiality of the London arbitration proceedings obstructs the grant of the relief sought by the applicant cannot be upheld.

Privilege

[39] I turn now to the claim of privilege. It requires to be addressed in different contexts. The categories to be considered are the following.

- (a) Statements of witnesses (factual and expert) presented to the arbitrators as the evidence in chief of such witnesses.
- (b) Transcripts of the arbitration proceedings and written submissions made by the parties thereto; and any awards made by the arbitration tribunal.
- (c) Documents relating to the applications for leave to appeal and the appeal on the discreet issues arising from the arbitration.
- (d) Certain correspondence.

[40] The argument for the first respondent appears to be this. The witness statements sought by the applicant were prepared both for the purposes of the arbitration and the litigation against the applicant. They are privileged as against the applicant for that reason. The applicant must show that the privilege has been waived. The only evidence of waiver submitted by the applicants is the submission of such statements in the arbitration.

[41] In my view there is a clear fault line in the first of the propositions relied upon by the first respondent. The applicant does not seek the production of witness statements lodged in the attorney's file, or in counsel's brief. It does not seek either reports or statements made by the first respondent's expert witnesses which would normally have been produced during the course of and for the purpose of trial preparation. It is not argued that such are not covered by privilege. The applicant seeks the so-called witness statements which were prepared in respect of both expert and factual witnesses, and which were presented as their evidence in chief in the arbitration proceedings. As far as the experts are concerned it seeks also any reports which were disclosed in the arbitration proceedings. As to the statements in question, they were not formulated for the purpose of the present litigation. Given their character,

they were prepared for the purpose of presenting the evidence in chief of the witnesses to the arbitration tribunal.

[42] When those statements (by the witnesses of the first and second respondents alike) were published to the opposing party and to the tribunal, the privileged quality thereof was abandoned. Each of the parties to the arbitration could thenceforth only rely upon the confidentiality of the proceedings in order to avoid the dissemination of the material contained in those statements.

[43] The first respondent's argument appears to be that, by reason of the confidentiality of the arbitration proceedings, there was a waiver of privilege by each of the parties only with respect to the other. The viability of that argument depends on the quality of the confidentiality attached to the arbitration proceedings by English Law. As already discussed, that element of confidentiality is not absolute. It is subject to exceptions, two (or perhaps three) of which are material in the case of other litigation on the same or similar subjects as those with which the arbitration proceedings were concerned. Both the first and second respondents must be assumed to have been advised that, given the circumstances, the materials submitted during the arbitration were liable to be disclosed in related litigation. Each of the respondents chose to sue the applicant in this court. They must be taken to have been aware of the fact that, with respect to those two actions, the confidentiality of the arbitration proceedings, and any privilege attaching to materials deployed in the arbitration, was compromised. (Thus, I suggest, the concession made by Mr Edwards on behalf of the first respondent from the outset, that it is open to this court to order disclosure.) Casting the argument in the language of waiver, the position is as follows.

- (a) Each of the first and second respondents were party to arbitration proceedings in London.
- (b) Each of the first and second respondents instituted actions against the applicant out of this court.
- (c) Each of the first and second respondents agreed to conduct the arbitration proceedings in advance of the trials in this country.
- (d) Each of the said parties was legally represented at all material times.

- (e) Given the law on the subjects of privilege and confidentiality, the conduct of the first and second respondents, judged objectively, manifests an intention to waive any privilege, and the benefit of confidentiality, with regard to the arbitration proceedings and the material deployed in it.

(See: *Contango Trading SA and Others v Central Energy Fund SOC Ltd and Others* 2020 (3) SA 58 (SCA) at paragraph 51. On implied waiver, see also *Ibex RSA Holdco Ltd and Another v Tiso Blackstar Group (Pty) Ltd and Others* [2024] ZASCA 166 (4 December 2024) at paragraphs [77] and [78].)

[44] Suitable adjustments to the order sought by the applicant relating to witness materials (statements and reports), to make it clear that the order is not designed to intrude into privileged material held by the first respondent, were debated during argument, and are reflected in the order I propose to make in this case.

[45] On the subject of transcripts of the arbitration proceedings, submissions and awards, the first respondent's argument is rendered in counsel's heads of argument as follows.

"Documents and the like are clearly prepared for the purpose of advancing the claim and subject to privilege. The *viva voce* evidence is merely an oral statement of the witness – and the transcript thereof is subject to privilege in the same way as is the written document."

There is no merit in this argument. It implies that, presumably in all cases, witness testimony under oath which coincides with the content of the same witness's statement sequestered in the attorneys file or counsel's brief, inherits the privilege attached to the latter document. I was referred to no authority to support such a proposition. The protection of the transcripts, as well as the other documents which make up the record of the arbitration, rests solely on the condition of confidentiality, which I have already addressed.

[46] With regard to documents relating to the appeal arising out of the arbitration between the first and second respondents, it is properly pointed out by the first respondent that these are public documents. However they are public in England, not

in South Africa. I take the view that considerations of fairness justify an order that such of the documents which are sought, as may be in the possession of the first respondent, be produced.

[47] I turn finally to the question of correspondence. Correspondence of the type in question was dealt with as item 9 in the privileged schedule annexed to the first respondents discovery affidavit dated 22nd November 2018. Correspondence of the same type features in the applicants Rule 35(3) notice, but is there restricted to correspondence of the type generated after 22nd November 2018. The two claims can be consolidated into a single one, which would read as follows after modifications to the order sought were debated in argument. The applicant seeks

“Relevant correspondence (excluding correspondence of a genuinely without prejudice nature) relating to the arbitrations, exchanged between the owners and the charterers, and between the owners and the cargo interests (in each case including those parties via their legal representatives) relating to the casualty.”

[48] In his response to the Rule 35(3) notice, and in the answering affidavit, Mr Edwards claimed privilege in respect of this correspondence, which would be waived in due course. The basis for that claim of privilege is not clear to me. One assumes that he would also claim confidentiality. However the point is made by Mr Edwards that the documents would include “a vast range of wholly irrelevant matter (think for example of arrangements in respect of hearings, transcription and so forth)...”. He is clearly correct. However it is not impossible that some of that correspondence reflects information which is relevant to the present litigation. The implication in the response from Mr Edwards to the request for this correspondence is that there may be some that is relevant, but which has not been disclosed in the light of an erroneous claim of privilege, or in consequence of misplaced reliance on confidentiality, in order to avoid disclosure. In my view a blanket order for production of this correspondence is not justified. It seems to me that the fair solution to this problem lies in directing the first respondent to deliver a further supplementary discovery affidavit dealing with this correspondence in the light of what has already been stated in this judgment on the subjects of privilege and confidentiality in the context of the present litigation.

Delaying the Production of Documents

[49] It remains to deal with the conditional counterclaim, that any disclosure this court may order the first respondent to make should be delayed until after the applicant has delivered the summaries of the evidence of its expert witnesses. I accept counsel's submission that, technically speaking in any event, such a condition could be imposed in terms of Rule 25 of the Admiralty Rules or Rule 45A of the Uniform Rules. (*Crown Cork* might also stand as authority for that proposition.) Assuming the competence of a conditional order for the production of documents, the issue as to whether such a condition should be imposed must turn on whether it would be in the interests of justice to do so.

[50] Counsel was unable to cite any authority supporting the imposition of the condition sought by the first respondent. However, on the footing that the witnesses who the first respondent intends to call at trial are the same as those deployed in the arbitration between the first and second respondents, it is argued that the applicant's expert summaries will be delivered, in effect, after the close of the evidence to be introduced by the first respondent – ie, in effect after the close of the plaintiff's case. That is said to be unfair.

[51] In terms of our rules and practice discovery inevitably precedes the production of any expert summaries which may require to be delivered in advance of a trial. Admissible expert opinions must address the facts of the case, some of which may emerge from the documents which the parties must exchange. This will not be the first case in which a large portion of what a party proposes to put before a court at trial is already recorded in discoverable documents.

[52] In terms of our Uniform Rules expert summaries by the plaintiff are delivered before those of the defendant are due. Given that, I do not see why there can be a legitimate objection to the expert evidence in the arbitration proceedings being disclosed before the applicant's expert summaries in the present case are provided. If anything, adhering to the usual order of things may avoid delay in achieving trial readiness by reason of a need for the delivery of supplementary expert reports by the applicant.

[53] I conclude that the condition ought not to be imposed.

[54] I make the following order.

1. The first respondent is directed to produce such of the following documents as may be in its possession relating to the London arbitration proceedings between the owners of the MV Smart and the charterers of the MV Smart (the “charterparty arbitration”), and the arbitration proceedings between the owners of the MV Smart and the cargo interests, within 15 days of the date of this order.
 - (a) Final versions of the pleadings (submissions), including requests for particulars and replies thereto.
 - (b) Statements presented as the evidence of factual witnesses called to give evidence and relied upon by the parties at the arbitrations.
 - (c) Statements presented as the evidence of expert witnesses called to give evidence and relied upon by the parties at the arbitrations, as well as any reports of expert witnesses (including reports or presentations given by experts in electronic form) which were presented to the arbitrators.
 - (d) Full transcripts of the arbitration proceedings.
 - (e) Written submissions made to the tribunal by the parties’ counsel (including opening and closing submissions).
 - (f) Arbitration awards, including final awards, interim awards and rulings.
 - (g) Applications for leave to appeal in the charterparty arbitration, including founding and answering papers, written submissions by counsel, and any judgments or orders therein.
2. (a) The first respondent is directed to deliver a further supplementary discovery affidavit dealing with relevant correspondence (excluding correspondence of a genuinely without prejudice nature) relating to the arbitrations, and exchanged between the owners and the charterers, and between the owners and the cargo interests, (in each case including those parties via their legal representatives) relating to the casualty.

(b) The assessment of the obligation to produce any of the said correspondence found to be relevant shall be made in the light of the content of this judgment on the subjects of privilege and confidentiality relating to the documents dealt with in this judgment.

3. There shall be no order as to the applicant's application to strike out.
4. The counter-application, insofar as it relates to the claim that the implementation of paragraph 1 of this order should be delayed, is dismissed, and the costs incurred in that aspect of the counter-application shall be regarded as costs in the application.
5. The costs of this application, including the costs of two counsel, shall be paid by the two parties comprising the first respondent (the owners of the MV Smart and the underwriters of the MV Smart), their liability being joint and several. The costs of counsel may be taxed on scale C in the case of senior counsel, and scale B in the case of junior counsel.



Olsen J

Case Information:

Date of hearing:

2 December 2025

Date of Judgment:

22 December 2025

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