THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case no: 487/07

NAME OF SHIP: MV *'ORIENT STRIDE'*

In the matter between:

ASIATIC SHIPPING SERVICES INC APPELLANT

and

ELGINA MARINE COMPANY LTD RESPONDENT

Neutral citation: *Asiatic Shipping Services Inc v Elgina Marine Company Limited* (487/07) [2008] ZASCA 111 (23 September 2008)

Coram	:	SCOTT, STREICHER, HEHER, COMBRINCK JJA *et* LEACH AJA
Date of hearing	:	25 AUGUST 2008
Date of delivery	:	23 SEPTEMBER 2008
Corrected	:	

Summary: The origin and meaning of the requirement in a security arrest in terms of s 5(3) of Act 105 of 1983 that there be a 'genuine and reasonable need for security'.

ORDER

On appeal from the High Court, Durban (Patel J sitting as court of first instance).

The appeal is dismissed with costs.

JUDGMENT

SCOTT JA (STREICHER, HEHER, COMBRINCK JJA et LEACH AJA concurring):

[1] On 24 March 2006, Elgina Marine Company Ltd (to which I shall refer as Elgina) sought and obtained ex parte in the Durban High Court an order in terms of s 5(3) of the Admiralty Jurisdiction Regulation Act 105 of 1983 ('the Act') for the arrest of the bunkers on board the MV *Orient Stride* and of the right to certain freight held by agents on behalf of Asiatic Shipping Services Inc (to which I shall refer as Asiatic). The purpose of the arrest was to provide security for Elgina's claims against Asiatic in arbitration proceedings in London.

[2] Elgina is a company registered according to the laws of Cyprus and carries on business as a ship owner in Limassol, Cyprus. Asiatic is a Panamanian registered company and carries on the business of ships' charterers in Kuala Lumpur, Malaysia. Elgina's claims against Asiatic are for a total of US$ 404 228.47, including costs and interest, and arise out of the charter to Asiatic of the MV *Columbine Express.*

[3] On 4 April 2006 security by way of a guarantee was furnished on behalf of Asiatic to procure the release of the property arrested and to permit the *Orient Stride* to continue on her voyage. The guarantee was conditional

on its being of no force and effect in the event of the court ordering that Elgina was not entitled to arrest the property in question.

[4] In the meantime, on 31 March 2006 Asiatic launched an application for an order setting aside the arrest. The application was opposed by Elgina and on 5 February 2007 it was dismissed by Patel J with costs. The appeal is with the leave of this court.

[5] Although Elgina was the respondent in that application it was common cause that it bore the onus of justifying the arrest. (See eg *Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris* 1989 (3) SA 820 (A) at 834C-F.) In seeking to do so, it was not confined to the allegations made in its ex parte application. It was entitled to rely on all the information properly placed before the court in the subsequent application to set aside the arrest. (*Weissglass NO v Savonnerie Establishment* 1992 (3) SA 928 (A) at 936H.) For reasons which are no longer relevant, material correspondence and other documents came to light at a late stage and after the court a quo had given judgment. By agreement between the parties these were placed before this court and admitted as part of the record.

[6] In *Thalassini Avgi* at 832I-833A this court set out what was required to be established by a party seeking to justify an arrest for the purpose of obtaining security. However, the court was then concerned with the Act before its amendment in 1992 which broadened the scope of s 5(3). The requirements, as modified by the amendment, are now conveniently listed in Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa* at 92. In the present case it was ultimately common cause, or not in dispute, that the bunkers were the property of Asiatic and that Elgina had established a prima facie case against Asiatic. The only issue that remained was whether Elgina had discharged the burden of establishing on a balance of probabilities that it had a genuine and reasonable need for security.

[7] 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 *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) 563 (A) at 583E-F 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 (*Bocimar NV v Kotor Overseas Shipping Ltd,* supra). Whether a need for security has been shown to exist or not will depend therefore upon a consideration of the particular facts of each case.

[8] Against this background, I turn to the facts. They are largely common cause. By a charterparty dated 6 September 2001 made between Cyprus Maritime Co Ltd, acting according to Elgina on its behalf as owner of the *Columbine Express*, and Asiatic, the former chartered the vessel to the latter for a round trip of a maximum of 40 days. Clause 45 of the charterparty made

provision for arbitration in London before two arbitrators, one to be appointed by each party. In pursuance of the charterparty the vessel was delivered on 9 September 2001. Redelivery was to take place at the latest on 19 October 2001. In the event the vessel was redelivered on 5 December 2001.

[9] In February 2002 Elgina commenced arbitration proceedings, claiming US$ 12 916.83 in respect of the balance of hire claimed to be due and US$ 194 005.64 as damages for the late redelivery of the vessel. Elgina's points of claim were filed in July 2002 and on 20 September 2002 London solicitors, Stephenson Harwood, applied to join Pacific Inter-Link Sdn Bhd ('PIL') in the proceedings. In October 2002 a defence and counterclaim were filed in which Asiatic asserted that it was the chartering arm of PIL and that it had entered into the charterparty as agents for PIL as undisclosed principals. The relevant part of paragraph 3 of the defence reads:

'Asiatic Shipping Services Inc ('the Charterers') entered into the . . . Charterparty as agents for Pacific Inter-Link Sdn Bhd ('PIL') as undisclosed principals. The Charterers are the chartering arm of PIL and regularly enter into charterparties as agents for PIL. Both companies are operated from the same business address and have common directors. PIL paid hire due under the . . . Charterparty. PIL are, consequently, a party to the arbitration agreement through their agents, the Charterers.'

Elgina subsequently filed its reply on 27 February 2003.

[10] In the joinder application leave was sought for PIL to be joined for the purposes of the counterclaim only. The solicitors then acting for Elgina, Ince & Co, took up the attitude that PIL should also be joined as a co-respondent for the whole arbitration on the basis that as the undisclosed principal of Asiatic it should be a party to the arbitration reference and therefore be bound by any award made by the tribunal. They advised Stephenson Harwood, who acted

for both PIL and Asiatic, that Elgina would agree to the joinder but required security for its claim. Subsequently, on 9 June 2003 Ince & Co wrote to Stephenson Harwood pointing out that the question of PIL's joinder as a co-respondent remained outstanding and requested that they confirm PIL's consent to be joined in the arbitration reference on the terms Ince & Co had proposed. In a curt response Stephenson Harwood wrote on the same day that their clients were not prepared to consent to the terms of the joinder proposed by Ince & Co.

[11] On 17 June 2003 Ince & Co responded by referring to the apparent inconsistency between the allegations made in para 3 of the defence (quoted in para 9 above) and the attitude then being adopted by PIL and Asiatic. They wrote:

'[It] appears to us that, on the one hand your clients are happy to wade in as Charterers in order to put forward their Counterclaim yet, on the other they are reticent to confirm that, as Charterers, they will also be bound by any Award made by the Tribunal in respect of Owners' principal claim. Your clients cannot have their cake and eat it.'

They accordingly called on Stephenson Harwood to confirm inter alia that PIL considered itself as an undisclosed principal and charterer bound by the arbitration agreement contained in the charterparty and agreed to be bound by any arbitration award made by the tribunal in respect of Elgina's principal claim.

[12] Stephenson Harwood responded by letter dated 23 June 2003, which reads in part:

'We refer to your fax dated 17 June 2003 in connection with whether or not PIL should be joined as a party to the current arbitration reference. In light of your client's unreasonable demands for security for the claim, Asiatic and PIL have decided not to join PIL to the arbitration. Asiatic, as agents for undisclosed principals, can bring the counterclaim

themselves. The Defence and Counterclaim have already been pleaded to reflect the relationship between Asiatic and PIL and therefore only minor amendments will be needed.'

Elgina's reaction was on 18 March 2004 to send to PIL a notice of appointment of an arbitrator with the object or pursuing its claims against PIL. The latter's Malaysian solicitors, Sativale Mathew Arun, responded in a letter dated 23 April 2004, in which they declined to appoint an arbitrator, saying:

'It is our client's stand that there is no arbitration agreement between your client and our client.'

[13] At about this time and, no doubt, in the light of what had transpired, Elgina's P and I club advised that it was no longer prepared to finance the prosecution of the claim in the absence of security being put up by Asiatic as there appeared little prospect of Elgina otherwise recovering the amount of any award that may be made in its favour. In May 2004 Elgina decided not to continue incurring the costs of employing Ince & Co but to employ its own legal staff. It accordingly terminated that firm's mandate and paid its fees. This ultimately led to a misunderstanding which in turn became an issue which gained much prominence in the affidavits exchanged between the parties. In short, on 5 February 2005 Ince & Co advised one of the arbitrators, Mr George Lugg, that they were no longer acting for Elgina which had passed the matter on to Cyprus Maritime Co Ltd, its managers, for future handling. In June 2005, when clarification as to the status of the arbitration was sought by the other arbitrator, Mr Robert Gaisford, Ince & Co mistakenly advised on 9 June 2005 that the matter was closed. As a consequence of this Asiatic sought to set aside the arrest on the grounds that Elgina had failed to disclose that the arbitration was no longer extant and for this reason alone it did not have a prima facie case against Asiatic. In the light of the explanation put up by Elgina the point was abandoned by Asiatic when the matter was argued in the court a quo. I should add that subsequently on 18 June 2007 a declaratory

award was made by the arbitrators in which they ruled that the reference had not been terminated and that the tribunal accordingly remained extant.

[14] In the meantime, in January 2005 Elgina had decided to engage another firm of solicitors, Davies, Johnson & Company, to act on its behalf. In the absence of security, however, it was considered that no purpose would be served by taking active steps to pursue the arbitration. Mr Johnson of that firm did some investigation to ascertain the activities of Asiatic. This ultimately resulted in the arrest which forms the subject matter of this appeal.

[15] It is clear from the aforegoing that PIL and Asiatic are closely associated companies. The latter is the 'chartering arm' of the former. Both have the same business address and they have common directors. Asiatic asserted in its defence that it was merely the agent of PIL and that PIL was accordingly a party to the arbitration agreement. Yet PIL sought to be joined in the arbitration for the purposes of the counterclaim only. When it was pointed out that as a party to the arbitration agreement it would be liable to Elgina in the event of the latter succeeding in its claim, it abandoned its application to be joined and, notwithstanding the stance adopted in the defence that it was an undisclosed principal and hence a party to the arbitration agreement, distanced itself from the arbitration. It was clearly anxious to ensure that in the event of an adverse award, that award would be made against Asiatic and not against it. The most likely inference that arises is that PIL holds the assets of the enterprise and not Asiatic. The inference is supported by the assertion in the defence that PIL, and not Asiatic, paid the hire under the charterparty. It is further supported by the fact that the security put up on 4 April 2006 emanated from PIL and not Asiatic.

[16] In the application to set aside the arrest Asiatic alleged simply that it had 'more than sufficient assets to satisfy any judgment'. In its answer, Elgina

observed that no details of those assets were given. Having regard to the nature of the application and PIL's change of stance, one would have expected that if Asiatic had assets, it would in reply at least have given some indication of their nature and extent. Had it done so, its response may well have put paid to the application for security. But it declined to do so. Instead, it contended that its financial standing was 'now a moot point because [Asiatic] has in fact secured [Elgina's] claim'. This evasive response was in itself sufficient to cause concern to a reasonable person in the position of Elgina, particularly when regard is had to the fact that it was PIL and not Asiatic that had provided the security.

[17] In all the circumstances Elgina, in my view, succeeded in establishing the existence of a reasonable apprehension that Asiatic would not satisfy an award made against it in Elgina's favour. It accordingly discharged the burden of establishing that it had a genuine and reasonable need for security, and the appeal must therefore fail.

[18] The appeal is dismissed with costs.

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D G SCOTT

JUDGE OF APPEAL

Appearances:

For Appellant:	D Gordon SC
Instructed by:	Deneys Reitz Inc Durban
	Webbers Bloemfontein
For Respondent:	D J Shaw QC
Instructed by :	Shepstone & Wylie Durban
	Israel Sackstein Matsepe Inc Bloemfontein