THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 1085/ 2019

In the matter between:

MARTRADE SHIPPING AND TRANSPORT GmbH APPELLANT

and

UNITED ENTERPRISES CORPORATION FIRST RESPONDENT

MV 'UNITY' SECOND RESPONDENT

Neutral Citation: *Martrade Shipping and Transport GmbH v United Enterprises Corporation and MV 'Unity'* (1341/18) [2020] ZASCA 120 (2 October 2020)

Coram: NAVSA, MAKGOKA and SCHIPPERS JJA and EKSTEEN and GOOSEN AJJA

Heard: 31 August 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 2 October 2020

Summary: Interpretation of court order – manifest purpose of the order – consideration of language used in light of ordinary rules of grammar – whole of the order to be read – where ambiguous a sensible, practical interpretation to be adopted which fosters purpose for which order granted.

ORDER

On appeal from: The KwaZulu-Natal High Court, Pietermaritzburg (per Bezuidenhout, Gyanda and Chili JJ) sitting as court of appeal:

1. The appeal is upheld with costs.
2. The order of the court below is set aside and substituted as follows:

   '(a) The appeal is upheld with costs, including the costs related to the withdrawn cross-appeal;

   (b) The order of the court below is set aside and substituted as follows; "The application is dismissed with costs".'

JUDGMENT

Goosen AJA (Navsa, Makgoka and Schippers JJA and Eksteen AJA concurring)

[1] This appeal concerns the proper interpretation of a court order granted in relation to a claim for security in a maritime dispute. The central question is whether the order obliged the furnishing of security with a period of 15 days of the date of granting the order.

[2] The principles which apply to the interpretation of court orders are well-established. Trollip JA observed in *Firestone South Africa (Pty) Ltd v Gentiruco AG*[1] that the same principles apply as apply to construing documents. Thus,

'..(T)he court's intention is to be ascertained from the language of the judgment or order as construed according to the usual, well-known rules… Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole to ascertain its intention.'

[3] The starting point, it was held in *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Limited and others*[2], is to determine the manifest purpose of the order. This was endorsed by the Constitutional Court in *Eke v Parsons*[3]. This court, in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[4], described the process of interpretation as involving a unitary exercise of considering language, context and purpose. It is an objective exercise where, in the face of ambiguity, a sensible is to be preferred to one which undermines the purpose of the document or order.

The facts

[1] *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 304; [1977] 4 All SA (A) at 604.
[2] *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Limited and others* 2013 (2) SA .204 (SCA) para [13] [2012] ZASCA 49.
[3] 2015 (11) BCLR 1319 (CC) para [29].
[4] 2012 (4) SA 593 (SCA) para [18].

[4] The appellant, Martrade Shipping and Transport GmbH (Martrade Shipping) caused the second respondent (the MV Unity) to be arrested in the Durban port on 21 February 2014. The arrest was in terms of s 5 (3) of the Admiralty Jurisdiction Regulation Act [5] (the Admiralty Act) to provide security for Martrade Shipping's claims against the first respondent , United Enterprises Corporation, (United Enterprises) in ongoing arbitration proceedings in London (the arbitration proceedings). United Enterprises thereafter gave a letter of undertaking as security for the claims and obtained the release of the MV Unity from arrest. The MV Unity however, was deemed to be under arrest in terms of s 3 (10) of the Admiralty Act.

[5] In April 2014 United Enterprises brought an application in the KwaZulu-Natal Division of the High Court (the high court) to set aside the arrest of the MV Unity. In the event that the arrest was not set aside, United Enterprises sought counter-security for its claims against Martrade Shipping in the arbitration proceedings. The application was dismissed. However, it granted the application for counter security. It is this order which is the subject of the interpretation dispute.

[6] The relevant part of the order read as follows:

'2.1 The respondent [Martrade Shipping] is directed to give security in a form acceptable to the applicants, alternatively to the Registrar of the above Honourable Court in the event of the parties not reaching agreement, in the amount of US$ 978 868.69 within

[5] 105 of 1983.

fifteen (15) days of the gran.t of this Order in respect of the first applicant's [United Enterprises] claim in the London arbitration proceedings;[6]

…

2.2 Failing compliance with paragraph 2.1 above within thirty (30) days of the date of granting this order, the respondent [Martrade Shipping] is directed to return to the applicants [United Enterprises] the letter of undertaking given by the applicants pursuant to the arrest order of 21 February 2014, and the arrest of the second applicant [MV Unity], shall lapse.'

[7] It was common cause that the 15-day period in paragraph 2.1 of the order expired on 18 January 2017, and that the 30-day period in paragraph 2.2 expired on 5 February 2017. Martrade Shipping's insurer tendered a letter of undertaking as security on 17 January 2017. United Enterprises refused to accept the tendered undertaking. Accordingly, on 18 January Martrade Shipping referred the determination of the form of security to the registrar for a decision. The registrar approved the tendered security on 1 February 2017 and it was provided to United Enterprises on that date.

[8] On 22 March 2017 the respondents commenced an application to set aside the directive issued by the registrar on 1 February. They also sought orders declaring that the arrest of the MV Unity had lapsed, and directing the return of the letter of undertaking provided by United Enterprises. That application was heard by Maharaj AJ who, on 15 March 2018, granted the relief sought. The order also provided for the reduction of the amount of security provided by Martrade Shipping to an amount of US$500 000.

[6] The other part of the order sets out, in a number of sub-paragraphs, specified claim amounts and specified interest claims. These are not reproduced here since they are not relevant in determining the purpose and meaning of the order.

[9] Martrade Shipping appealed against the order of Maharaj AJ declaring the provision of security out of time and that the arrest had lapsed. United Enterprises prosecuted a cross-appeal against the order reducing the security to be provided to US$500 000. The appeal was heard on 7 June 2019. By then the cross-appeal issue had become moot and it was withdrawn subject to the costs being costs in the appeal. On 28 June 2019 the full court dismissed the appeal. The appeal is with the special leave of this court.

The purpose of the order of 23 December 2016

[10] The description of the background to the present appeal points to an essential underlying purpose of the order to be interpreted. What was before Henriques J was a common conundrum faced in maritime claims: the balancing of the interests of contending parties to security for their claims where the dispute is being adjudicated in a foreign jurisdiction and where the effectiveness of a future judgment must be ensured.

[11] In *MV NYK Isabel; Northern Endeavour Shipping Pte Ltd v Owners of the MV NYK Isabel and Another* [7] this court set out the approach to the resolution of such conundrums in the exercise of a court's admiralty jurisdiction.

'The [Admiralty] Act is a special statute dealing with maritime matters and it is directed at meeting the needs of the shipping industry in enforcing maritime claims. It provides the Court with very extensive powers to deal with maritime cases. In regard to the breadth of these powers I draw attention to section 5(1), which empowers the Court, to join a person as a party "notwithstanding the fact that he is not otherwise amenable to the jurisdiction of

[7] *MV NYK Isabel; Northern Endeavour Shipping Pte Ltd v Owners of the MV NYK Isabel and Another* 2017 (1) SA 25 (SCA) para [44] – [45] (*Northern Endeavour).*

the Court", and to section 5(2) (a), which provides that a Court may decide any matter arising in connection with a maritime claim "notwithstanding that any such matter may not be one which would give rise to a maritime claim". These powers take account of the reality that maritime defendants are mobile and transitory in their presence in any particular jurisdiction. Perforce they compel maritime claimants to become "wandering litigants of the world", in the colourful expression of Didcott J recorded in *The Paz*, but without the pejorative overtones with which he used it. In order to address this problem the Act provides wide-ranging powers of arrest, both for the purpose of instituting actions in South Africa and to enable claimants to obtain security for proceedings in other jurisdictions.

It follows in my view that the provisions of the Act should be given a generous interpretation consistent with its manifest purpose of assisting maritime claimants to enforce maritime claims. That construction is also consistent with the right of access to Courts afforded to everyone in terms of section 34 of the Constitution. There is, however, a need for balance when the Courts exercise the expansive powers of arrest and attachment of vessels embodied in the Act. Section 5(2) (b) and (c) give Courts the means to balance the interests of claimant and defendant by ordering counter-security in appropriate cases and attaching conditions to orders of arrest or attachment. Thus, it is commonplace for an arrest to be subject to the provision of security for the costs of an application to set the arrest aside, or for any loss suffered in consequence of that arrest if it is subsequently set aside.' (Footnotes omitted)

[12] The court went on to state that where the requirements for security and counter-security are established and the merits of the claims are evenly balanced 'considerations of fairness suggest that either both parties should have security or neither'.[8]

[13] It is in the light of these general principles that the order of Henriques J must be understood. She stated in her judgment that the requirements of s 5

[8] *Northern Endeavour* par [58].

(3) of the Admiralty Act were met. She was therefore satisfied that an order be made in terms of s 5 (2) (*c*) of that Act. The section provides that a court may, in the exercise of its admiralty jurisdiction,

'(c) order that any arrest or attachment made or to be made or that anything done or to be done in terms of this Act or any order of the court be subject to such conditions as to the court appears just, whether as to the furnishing of security or the liability for costs, expenses, loss or damage caused or likely to be caused, or otherwise;'

It is apparent therefore that Henriques J considered that counter-security for United Enterprises' claims should be provided.

The meaning and effect of the order

[14] The appellant's argument was that the 15-day period provided in paragraph 2.1 of the order was not to be read as the period within which the security was to be furnished. Paragraph 2.2 qualifies paragraph 2.1 by providing for compliance within 30 days of the date of the order.

[15] Counsel for the respondents however, argued that paragraph 2.1 of the order must be read to mean that Martrade Shipping was obliged to deliver security for the amount stipulated within 15 days of the date of the order. The 15-day time period was one that applied to both circumstances envisaged by the order, irrespective of whether the form of security was agreed between the parties or it was determined by the registrar.

[16] Clause 2.2 of the order, if seen in this light, relates not to the provision of security but to the re-delivery of the letter of security which had been provided to secure the release of the MV Unity from arrest. Thus the 30-day period stated in the order is not to be construed as a period within which

security could be furnished, nor as upon expiry of which the arrest lapsed. The 30-day period was therefore to enable the administrative process of surrendering the letter of undertaking to occur.

[17] There are, as I shall demonstrate, several difficulties with this construction. There is nothing in the record or indeed in the prevailing circumstances to suggest that re-delivery of the letter of undertaking required any elaborate administrative process. Nor was it a matter which the court was called upon to consider and to which it applied its mind. Counsel conceded that in this instance no such 'administrative' considerations arise. It was also conceded that the terms of the letter of undertaking are such that upon the lapsing of or release from the arrest, the *causa* upon which the letter could be perfected falls away. The re-delivery or return of the letter of undertaking carried no consequence.

[18] Moreover, there are textual difficulties with the construction advanced on behalf of the respondents. Paragraph 2.1 employed the word 'alternatively'. In doing so it posited two options or possibilities which governed the furnishing of security. The first option was the provision of security in a form acceptable to United Enterprises, ie in a form agreed between the parties. The second option arose in the event that agreement was not reached. In that event the registrar was to determine the form of security. These options accord with the practice that governs the provision of security. The textual difficulty arises with the phrase 'within fifteen days of the grant of the order'. It either qualified the giving of security in a form which was agreed or gave rise to a textual conflict with paragraph 2.2 of the order.

[19] Paragraph 2.1 of the order dealt with two distinct issues, namely the obligation to furnish security, and the determination of the form in which security was to be provided. Paragraph 2.2 on the other hand, dealt with the consequences of non-compliance with the obligation to furnish security. It also dealt with two distinct issues, namely the lapsing of the arrest of the MV Unity and the return of the letter of undertaking.

[20] Counsel for the respondents suggested the 30-day period concerned only the delivery of the letter of undertaking. That is not how the order reads. The phrase 'within 30 days of the date of this order' qualifies 'the failure to comply' with paragraph 2.1 of the order. It does so in a grammatical structure that describes the consequences of non-compliance, namely the directive to return the letter of undertaking and the lapsing of the arrest of the MV Unity, as flowing from that failure to comply.

[21] Thus, when paragraph 2.2 is read as it was written, the different time periods in 2.1 and 2.2, sensibly interpreted, must mean that the court intended that a period of 15 days be available to the parties to reach agreement as to the form of security and a further 15 days within which to provide security in a form acceptable to the registrar. A court is enjoined, where ambiguity presents itself, to interpret a document or order so as to avoid impractical, unbusiness-like or oppressive consequences which would undermine the purpose of the order. [9]

[9] *Endumeni* para [26].

[22] Henriques J afforded the parties an opportunity to agree to the form of security to be provided. This, in my view, is what paragraph 2.1 was intended to allow. When the order is read as a whole and is considered in context, the construction applied by the full court cannot be sustained. That interpretation was based upon a misreading of paragraph 2.2 of the order. At para 13 of its judgment the full court held that:

'Paragraph 2.2 of the order provides that if security was not provided within the 15 day period the letter of undertaking must be returned and grants a further period of 15 days to do so.'

[23] That is not what paragraph 2.2 states. For the reasons set out above, such interpretation does not accord with the grammatical structure of the language used in both paragraphs of the order. It follows that the appeal must succeed.

The order

[24] As indicated at the outset, the cross-appeal was abandoned before the full court. It was agreed that the costs be costs in the appeal. Paragraph 4 of the order granted by Maharaj AJ accordingly need not be addressed.

[25] In the result:

1. The appeal is upheld with costs.
2. The order of the court below is set aside and substituted as follows:

   '(a) The appeal is upheld with costs, including the costs related to the withdrawn cross-appeal;

   (b) The order of the court below is set aside and substituted as follows;

"The application is dismissed with costs".'

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G GOOSEN

ACTING JUDGE OF APPEAL

Appearances

For appellant:	L M Mills
Instructed by:	Bowmans, Durban
	Matsepes Inc, Bloemfontein
For respondent:	P J Wallis
Instructed by:	Shepstone & Wylie
	Webbers Attorneys, Bloemfontein.