IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: AC 131/2006
Related to Case No: AC 111/2006

In the matter between:

UNITED ENTERPRISES CORPORATION	**First Applicant**
MV "WISDOM C"	**Second Applicant**

and

STX PAN OCEAN COMPANY LIMITED	**Respondent**

JUDGMENT GIVEN THIS THURSDAY, 1 MARCH 2007

CLEAVER J:

[1] On 6 July 2006 and pursuant to an *ex parte* application brought by the respondent ("STX") as applicant, the MV "Wisdom C" ("the Vessel") was arrested in the exercise of the court's admiralty jurisdiction in terms of section 5(3) of the Admiralty Jurisdiction Regulation Act No 105 of 1983 ("the Act"). The arrest was for the purpose of providing security in arbitration proceedings in London for STX's counter-claims against the applicant ("UEC"), for payment of amounts due in terms of a Charterparty agreement and the repudiation thereof.

[2] Thereafter, security was provided by UEC, the owner of the Vessel, for an amount acceptable to STX and the Vessel was released from arrest and left the jurisdiction of this court.

[3] UEC now applies on motion for the deemed arrest of the Vessel to be set aside and for the letter of undertaking by which security was provided to be declared null and void. In the alternative, and in the event of the aforesaid prayers not being granted, UEC counterclaims for security to be furnished in respect of its claims in the arbitration proceedings in London.

[4] Before dealing with the grounds on which the applicant seeks relief, it would be convenient to record the events which preceded the application for the arrest of the Vessel in this court.

[5] On 17 December 2003 STX entered into a Time Charterparty (the Head Charterparty) with UEC whereby it agreed to hire the Wisdom C from UEC *"from the time of delivery, for a minimum 10 months upto about 13 months (about to mean 15 days more or less in CHOPT)"*. The Vessel was delivered to STX only on 23 September 2004 and STX was accordingly entitled to employ the Vessel for a period up to 7 November 2005. On 30 January 2004, STX as despondent owners sub-chartered the Vessel to VOC Bulk Carriers (*"the 1st Time Sub-Charteres"*) under a Time Charterparty for a period of about four to about six months. According to STX, the 1st time Sub-Charterers claimed off-hire and balance of account from STX and after adjusting for the difference in rates of hire STX

contend that they have a claim for off-hire and balance of account against UEC in the sum of US$283,282.00.

[6] The Vessel was re-delivered by the 1st Time Sub-Charterers to STX on 16 February 2005. However, on 28 January 2005 before the 1st Time Sub-Charterer party came to an end, STX sub time chartered the Vessel to Daeshin Shipping Co Ltd ("the 2nd Time Sub-Charterers"). The period of the sub time charter was *"from the time of delivery … for period minimum 6 months upto about 7 months"* and the Vessel was delivered to the 2nd Time Sub-Charterers on 16 February 2005. STX contends that the 2nd Time Sub-Charterers could have employed the Vessel for a duration of up to 1 October 2005.

[7] Before the 2nd Time Sub-Charterparty between STX and the 2nd Time Sub-Charterers came *to* an end, UEC purported to terminate the Head Charterparty agreement. This occurred in June 2005 when the Vessel was reported to have been refused permission to berth at the port of Mina Saqr in the United Arab Emirates ("UAE") on account of problems with the Vessel's crane. At that time disputes arose between STX and UEC in regard to the Head Charterparty. UEC contended that a rental payment due on 5 June 2005 had not been paid, whereas STX contended that even though the payment of hire had not been made, it had overpaid hire in the sum of US$15 608.47. There is a dispute as to what

happened at the port of Mina Saqr, but on 16 June 2005 UEC purported to terminate the Head Charterparty as a result of the alleged repudiatory breach thereof by STX and purported to withdraw the Vessel from STX's service. The claim for termination by UEC was based on the following:

1. STX had made excessive and unlawful deductions from hire.
2. STX had failed to provide and pay for bunkers.
3. STX had demanded unreasonable security during the course of negotiations to obtain security for its claim against UEC.

STX denies that the grounds for termination relied upon by UEC are sound in law and maintains that UEC's action in purporting to terminate the Head Charterparty amounted to a repudiatory breach thereof and alleges that in the result it has suffered damages.

[8] In March 2006, STX applied *ex parte* to the Italian Court of Gorizia for the arrest of the Vessel in order to provide security for the counter-claims which it intended to file in the arbitration proceedings in London. An order for the conservatory seizure of the Vessel was obtained and early in April a decision as to the future of the seizure order was made by a judge in Gorizia, after consideration of representations made on behalf of the parties. In terms of an order dated 8 April 2006, the order of seizure was revoked. An appeal noted by STX was dismissed *"on account of intervened lack of interest to act"*. Counsel were agreed that the reason for the dismissal of the appeal was that by the time the appeal was heard, the Vessel had left Italian waters and the court concluded that in the circumstances

the appellant had been unable to prove the existence and duration of its interest to act, i.e. the presence of the Vessel in Italian waters.

[9] The principal submission to me on behalf of UEC was that the judgment of the court at Gorizia constituted a final judgment and as such UEC was entitled to raise the exception *rei iudicatae.* In the alternative, it was submitted that the arrest warrant issued in this court should not have been granted because of material non-disclosures in the founding affidavit. Counsel for UEC also submitted that the founding affidavit in the proceedings before me lacked the necessary factual averments to establish the *prima facie* case which STX had to put up.

[10] The requirements for a successful defence of *res iudicata* are well known, namely that the judgment pleaded must be a final and definitive decision which puts an end to the dispute between the parties[1] .

[11] An English translation of the Gorizia judgment in which the arrest was set aside is included in the papers and both counsel have accepted the accuracy of the translation which does make for rather quaint reading.

[12] **THE GORIZIA JUDGMENT**

After dismissing certain points taken *in limine* on behalf of UEC, the judge

1 *Custom Credit Corporation (Pty) Ltd v Shembee* 1972 (3) SA 462 (A) at 472a; *African Farms and Townships Limited v Cape Town Municipality* 1963 (2) SA 555 (A) at 562C-D

proceeds to deal with what he terms the point of *"Fumus boni iuris"*. (Counsel were agreed that the English translation of '*fumus boni iuris*' is *prima facie* case). The judge then records that STX intends to bring an action in the arbitration proceedings in which it will dispute the lawfulness the termination of the Charterparty by UEC relating to

i) *"Set off on freight amounts to an excessive extent*

ii) *The failure of STX to pay for bunkers at their charge under the Charterparty"*

He finds that STX has made out a *prima facie* case *"at least as concerns the 'fumus'"* in respect of its claim for set-off on freight amounts to an excessive extent. However, in regard to the issue of payment for the bunkers, after recording that payment was not made, the judge concludes that the evidence presented on affidavit by STX is not sufficient *"since it is, in itself, but a statement of knowledge having no value even as a mere clue"*. (According to STX's expert, this was because evidence by way of affidavit was not acceptable.) Then follows what is to my mind the crucial portion of the judgment, namely:

> "*Moreover, the facts underlying the second Sub-Charterers' refusal to pay for bunkers and thus the alleged 'set-off' under point ii) hereof (against delays caused by the ship's cranes and the consequent inability of the ship to berth at the port of Mina Saqr) appear, under the present circumstances, altogether uncertain and unsubstantiated, with reference to both the 'an' and the 'quantum debeatur', there being no proof (on the point, a thorough investigation would be necessary, as object of the pending proceedings on the merits) either on the causes of such damages or on the party to whom they are ascribable, or again on the amount of the damages.*

In view of the foregoing, vis-à-vis the 'fumus' of the Defendants' submissions on the reasons underlying the advanced termination of the Charter and with specific reference to failure to pay for the bunker, in the light of the result of the summary investigation, which is customarily made in the preliminary proceedings for obtainance of a remedy measure,

the Court does not envisage the existence of the 'fumus boni iuris' in the Plaintiff's demand.

> *The Order of seizure granted 'ex parte' on 29.3.2006 must therefore be revoked."*

[13] Both parties produced an expert witness who supported each's case. On behalf of UEC, an affidavit was filed by one Filippo Bruno ("Bruno"), an Italian attorney with experience in maritime law. His view of the judgment is that the court set aside the arrest of the Vessel on the basis that STX's admitted failure to provide bunkers for the Vessel as it was obliged to do in terms of the Charterparty amounted to a breach of the Charterparty justifying the termination thereof by UEC. In his affidavit he records:

> *"The Court found that the Respondent had failed to establish even on a 'prima facie' basis that the conduct of the First Applicant (UEC) in terminating the Charterparty amounted to a repudiatory breach thereof entitling the Respondent to the contemplated relief it sought in the London proceedings."*

As to the order made by the appeal court, he states that STX's appeal *"was not admissible, because an appeal which cannot lead to a concrete result is not admissible for 'lack of interest', according to art. 100 of Italian Civil Procedure Code".* His view is that the decisions of both the court of first instance and the court of appeal are final because no further appeal is allowed against the decision. He bases this view on a judgment of the Court of Cassation, to which he refers, and also refers to article 669.septies paragraph 1 of the Italian Civil Procedure Code, the relevant portion of which reads:

> *"669.septies (Negative Order). A Court Order stating lack of jurisdiction does not prevent a new presentation of the petition. The Order of dismissal does not prevent a new presentation of the petition for a remedy in case the circumstances of the case change or new points of fact or law are submitted."*

In his view the papers filed in the application before me do not reveal any new facts, circumstances or other reasons which would persuade an Italian court to reconsider the arrest of the Vessel.

[14] Mr Alberto Batini ("Batini"), an Italian attorney who also practises maritime law, filed an affidavit on behalf of STX. He explains that article 669.septies of the Code of Civil Procedure provides for the issue of a decree of arrest without notice to the debtor if notice to the debtor might jeopardise the execution of the decree. The decree of arrest issued by a judge after a summary enquiry into the application is provisional only and stipulates a date by which the decree is to be served on the respondent and a date upon which the hearing will take place. Paragraph 2 of article 669.septies authorises the judge at the hearing to issue an order confirming, amending or setting aside the decree. His view is that until such time as the hearing takes place, the original *ex parte* order detaining the Vessel is, by its very nature, an interim order granted to enable the respondent an opportunity to submit his defence. It is only after the hearing before which there will be a more complete disclosure of documents and a full exchange of pleadings and motions, that the decree and arrest may be confirmed. Should the court, after the hearing, decline to confirm the provisional decree and set aside the arrest of the Vessel, the effect

thereof is as if the original petition had not been granted. As regards a new presentation of a petition, Batini's view is that the new points of fact or law referred to in the article may have been in existence at the time that the original decree was issued. His view is therefore that a conservatory arrest, which the arrest in question was, is interlocutory in nature according to Italian law. The arrest proceedings did not dispose of the merits of the dispute between the parties and a second arrest may be sought should circumstances change or new points of fact or law be advanced. He also refers to the 1952 Arrest Convention (presumably a convention adopted by Italy). Article 3(3) of the convention prohibits the re-arrest of a ship if it has been arrested in any one jurisdiction and bail or any other security has been given to procure the release of the ship from arrest. The Vessel arrested in Italy was released without any bail having been provided and accordingly the provisions of article 3(3) of the Arrest Convention do not apply.

In regard to *res iudicata* Batini's view is that the setting aside of a provisional decree such as one made in terms of article 669.septies of the Code of Civil Procedure does not give rise to a defence of *res iudicata* because:

14.1 The decree is provisional. When it is set aside, the effect of this is that it was as if the original petition has been rejected.

14.2 Article 669.septies, paragraph 1, of the Code of Civil Procedure expressly provides that a claimant may present a new petition for the conservatory arrest of property if there are changed circumstances, or where new points of fact or law are submitted. It is not necessary that the points of fact or law should only have come into existence after the provisional order was made. A new petition may be presented supported by different legal arguments based upon the same facts.

14.3 The setting aside of a provisional arrest order does not finally dispose of any part of the substantive dispute between the parties. These disputes will be dealt with in the

proceedings in the foreign jurisdiction.

[15] Counsel for UEC submitted that in terms of the Gorizia judgment the application had been refused and that on the authority of *African Farms and Townships v CT Municipality* the application had in fact been dismissed.

> "*As pointed out in* Purchase v. Purchase*, 1960 (3) S.A. 383 (N) at p. 385, dismissal and refusal of an application have the same effect, namely a decision in favour of the respondent.*[2]"

In support of his argument, counsel pointed out that the equivalent of an order for absolution would be that no order is made or that leave is granted to apply on the same papers. As no such orders were made he submitted that the judgment ought not to be interpreted as being akin to an order for absolution.

In my view, this argument loses sight of the nature of the unique proceedings before the Gorizia court which required the court to confirm, amend or set aside the provisional conservatory order.

It is clear from the judgment that the Gorizia court did not in terms dismiss the application. As to the form of the order, it would be instructive to bear in mind the distinction drawn by **Watermeyer** J in *Commissioner of Customs v Airton Timber Co Ltd*[3] between the actual judgment and the reasons for judgment. The learned judge expressed the view that, in effect where the decision of a particular question, although dealt with in the reasons for judgment is not incorporated in the actual judgment, and the question is not necessarily determined by the judgment, the matter is not *res iudicata.*

[16] As to the South African position, in terms of *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd*[4], I am to apply the *lex fori.* In this connection, regard may be

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2 1963 (2) SA 555 at 563E-G
3 1926 CPD 351 at 359
4 1986 (3) SA 501

had to *Great River Shipping Inc v Sunnyface Marine Ltd*[5]. In that matter the facts were not dissimilar to the facts in the matter before me. An order for the arrest of a ship which had been obtained *ex parte* was set aside on the ground that the applicant had failed to make out a *prima facie* case in respect of the cause of action on which it had relied. The application was thereafter supplemented by further affidavits and a second arrest was successfully obtained. The issue before the court was the interpretation to be given to the provisions of section 3(8) of the Act which reads

> *'Property shall not be arrested and security therefor shall not be given more than one in respect of the same maritime claim by the same claimant."*

The finding of the court was that the section could be invoked only where

a) An arrest which may be actual or deemed in section 3(10)(a) had been effected; and

b) Security had been provided.

Significantly, however, in the course of his judgment, **King** J said

> "*However, where an arrest, which is after all a procedural step which emanates* ex parte *from the office of the Registrar, is set aside by reason of a want of one or other of the legal requisites of a valid arrest (such as the absence of a* prima facie *case), then in my view s 3(8) does not preclude a further arrest provided such legal requisites are present on the later occasion."*[6]

This is clear authority against the application of the exception *rei iudicatae* where an arrest has been set aside on grounds that the applicant had failed to make out a *prima facie* case.

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5 1992 (2) SA 87

6 p 89 at G-H

Counsel for the applicants submitted that the judgment in *Great River Shipping Inc* was concerned only with the application of section 3(8) of the Act and did not provide authority for the proposition that the exception *rei iudicatae* would not apply where an arrest had been set aside on the grounds that the applicant had failed to make out a *prima facie* case. Although the pronouncement which I have quoted is *obiter*, its logic is in my view compelling. Furthermore, in terms of the Italian law, the refusal by a court to confirm a provisional arrest does not preclude the applicant from bringing a new application in which new points of fact or law are introduced, or in which changed circumstances are shown to exist. Similarly, in South Africa, it has been held that a party whose arrest is set aside as a result of a failure to place certain evidence before the court in its founding affidavit may simply bring a new application relying upon amplified averments. It is for this reason that our courts permit parties who have arrested vessels to advance any ground to justify the arrest, irrespective of whether or not it was relied upon initially in obtaining the arrest order[7].

[17] In the proceedings before me, STX, while being entitled to supplement its case for the arrest in its answering affidavit[8] bears the onus of establishing

1) That it has a *prima facie* cause of action
2) which is *prima facie* enforceable in the foreign court of its choice; and
3) that it has a genuine and reasonable need for security[9].

In *Bocimar NV v Kotor Overseas Shipping Limited*[10] the court held that the onus of proving the need for security is to be established on a balance of probabilities. With this as a starting point, counsel for UEC submitted that STX also bore the onus of establishing on a balance of probabilities that *res iudicata* did not apply. The logical extension of this submission was then that the *Plascon Evans* rule is to be applied and that accordingly, the view of UEC's experts as to the interpretation of the Gorizia judgment and the interpretation of the statute should apply.

I have some difficulty with this proposition. STX is required to establish that *prima facie* it

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7 *Transol Bunker BV v MV "Andrico Unity and others"* 1987 (3) SA 794 (C) 799G-H

8 *Transol Bunker BV* (*supra*) at 794C-J

9 *The Cargo Laden on Board the MV 'Thalassini Avgi' v MV 'Dimitris'* 1989 (3) SA 820 (A) at 832I-833A

10 1994 (2) SA 563 (A) at 580I-J

has an enforceable claim against UEC. In this context I cannot conceive that it now carries an onus similar to that which it has to prove its genuine and reasonable need for security. Its onus is merely to put up a *prima facie* case. The test for such a case has been stated to be the following:

> "*The authorities and considerations to which I have referred seem to justify the conclusion that the requirements of a* prima facie *cause of action, in relation to an attachment to found jurisdiction, is satisfied where there is evidence which, if accepted, will show a cause of action. The mere fact that such evidence is contradicted would not disentitle the applicant to the remedy. Even where the probabilities are against him, the requirement would still be satisfied. It is only where it is quite clear that he has no action or cannot succeed, that an attachment would be refused or discharged on the ground here in question."*[11]

On this basis, the view of STX's expert in regard to the Italian law is sufficient to make out a *prima facie* case, even if UEC's expert holds a different view.

[18] As explained in *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club*[12] a judgment is final if it has determined the substantive rights of the parties. In the matter before me, the issue is whether the Gorizia court made a final and definitive pronouncement on STX's claim that it was entitled to arrest the Vessel in order to obtain security for its counter-claim in the arbitration proceedings. As I understand the judgment, the court found

1) The so-called novation of the obligation to supply bunkers had not been substantiated, the reason being that the evidence tendered was by way of affidavit, and

2) That *"the facts underlying the second sub-Charterers' refusal to pay for bunkers*

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11 Per **Steyn** J in *Bradbury Gretorex Co (Colonial) Limited v Standard Trading Co (Pty) Limited*1953 (3) SA 529 (W) at 533C-E quoted with approval in *The Cargo laden on Board the MV 'Thalassini Avgi' v MV 'Dimitris'* 1989 (3) SA 820 (A) at 831H-832B

12 1977 (2) SA 38 (A) at 45-6

and thus the alleged 'set-off' under point ii) hereof (against delays caused by the ship's cranes and the consequent inability of the ship to berth at the port of Mina Saqr) appear, under the present circumstances, altogether uncertain and unsubstantiated, …"

In the result, the court could not find that the respondent had established a *prima facie* case. (*"The court does not envisage the existence of the fumus boni iuris in the plaintiff's demand."*) For that reason the order of seizure was revoked. In my view it is clear that the court did not find that the facts alleged by STX were insufficient to establish a *prima facie* case, but rather that the facts had not been substantiated. (Incidentally, Bruno also appears to be incorrect with his contention that the court set aside the arrest of the Vessel on the basis of STX's admitted failure to provide bunkers for the Vessel. The court merely found that as a fact, payment for the bunkers had not been made, but as I have indicated, STX's case was that it did not need to make payment for the bunkers as it had already overpaid on the hire due to UEC.) I do not agree with counsel for UEC that the order amounted to a dismissal of STX's claim. In my view, the order was akin to an order for absolution from the instance. For that reason, I conclude that the exception of the *rei iudicatae* cannot be sustained.

[19] In the alternative, counsel for UEC submitted:-

* That no case had been made out in the founding affidavit and that accordingly there was nothing which could be supplemented in the answering papers; and
* STX's failure to place all material information before the judge who authorised the arrest warrant amounted to a breach of the requirement of

uberrima fides and for that reason also the *ex parte* order ought not to have been granted.

[20] Relying principally on the decision in *Qatar Steel Company Ltd v The Doxa* ("the Doxa")[13], counsel for UEC submitted that the allegations in the founding affidavit were so lacking in sufficiency that no *prima facie* case had been made out. In the Doxa the applicants purported to adduce evidence that the servants of the carrier did not exercise due diligence in order to show that the carrier was not exempted from certain provisions of the Hague and Hague-Visby Rules. The court found that the deponent to the founding affidavit went no further than to contend that the engine failure of the vessel resulted from the respondent's servants lack of due diligence. The court's view was that this was insufficient.

Two submissions were advanced on behalf of UEC;

* Firstly, that the founding affidavit contained only assertions by the deponent; and

* Secondly, that the deponent should have revealed the nature of UEC's claim of a repudiatory breach by STX as the latter's claim flowed from this.

[21] As is usual in cases of this nature, the deponent to the founding affidavit was an attorney from the firm of attorneys representing STX. She sets out her authority to make the affidavit in the following manner:

> *"3. The contents of this affidavit are not within my knowledge, unless otherwise stated, but have been made known to me by the following*

13 SCOSA B277D

people:

3.1 Mr Nick Graydon, a partner in the firm Clyde & Co. of 51 Eastcheap, London, EC3M 1JP, my firm's instructing correspondent in this manner. Mr Graydon has the conduct of the matter on behalf of Applicant and has knowledge of the facts set out herein in relation to the arbitration proceedings commenced by the First Respondent in London as referred to below, as well as the counterclaim instituted by the Applicant herein in such arbitration proceedings.

*3.2 Mr Graydon informs me that he is, in turn, instructed by Mr Jae Hoon Kim, the manager (Insurance and Legal Department) of **STX Pan Ocean Co Ltd**, the Applicant in these proceedings, which has its offices at Seoul, South Korea.*

4. I believe the information given to my by Mr Graydon to be true and correct, and I depose thereto on such basis. In turn, Mr Graydon informs me he believes the information and instructions given to him by Applicant's officers and servants to be true and correct. Mr Graydon informs me that he has personal knowledge of the said arbitration proceedings in London, and has obtained his knowledge of the factual averments relating to the claim and other facts set out relating thereto from the aforesaid sources.

……

9. Disputes have arisen between Applicant and First Respondent in connection with the said charterparty, in respect of which arbitration proceedings have been instituted in London for the litigation of such disputes. Applicant avers that it has certain substantial claims against First Respondent arising out the aforesaid charterparty. Applicant holds no security for such claims, and has a genuine and reasonable need for such security…"

[22] The deponent then deals with UEC's alleged claims against STX in the following manner:

"10. First Respondent has alleged that it withdrew the Second Respondent from the said charter owing to Applicant's alleged repudiatory breach of the charterparty. In essence, First Respondent alleges that, in breach of its obligations under the charterparty:

10.1 Applicant failed and/or refused and/or neglected to pay the full amount of hire due to First Respondent;

10.2 Applicant failed and/or refused and/or neglected to stem bunkers to the Second Respondent vessel at the port of Mina Saqr, at a time when the fuel position of the Second Respondent vessel was critically low.

11. First Respondent alleges further that such alleged breaches by Applicant constituted a repudiation by Applicant of the charterparty, which alleged repudiation First Respondent accepted and consequently took the Second Respondent vessel off-hire from Applicant.

12. First Respondent alleges further that it has a claim against Applicant for the alleged unpaid charter hire, and for alleged damages arising from Applicant's alleged unlawful repudiation of the charterparty. Respondent further asserts an additional claim for alleged damage to the Second Respondent vessel by Applicant's servants/agents."

After recording that STX has asserted its claims against UEC in the arbitration proceedings, the deponent records that STX's defence to UEC's claim and its counter-claim against UEC in the arbitration proceedings run to several hundred pages. For this reason, a copy of all the papers was not annexed to the founding affidavit, but STX's defence and counter-claim submissions (without annexures) were annexed. The deponent then alleges that from the defence and counter-claim submissions it is clear that on the face of it STX has valid defences to UEC's claims *inter alia* on the basis that

"15.1.1 Applicant was entitled to deduct certain sums from the hire payable to First Respondent owing to First Respondent's non-performance under, and/or breach of the terms of, the terms of the charterparty;

15.1.2 Rather than Applicant failing or refusing to stem bunkers to the vessel as required, such bunkers could not be stemmed owing to Second Respondent being refused entry to

port by reason of equipment deficiencies, which deficiencies were the responsibility of First Respondent."

Details as to how STX's claim for damages are arrived at are provided and the relevant portion of the affidavit concludes with the following:-

> *"I respectfully submit that such claims by Applicant have been sufficiently particularised and evidenced herein so that, if accepted, same will establish a cause of action for Applicant against First Respondent in respect thereof."*

[23] As already mentioned, in establishing its *prima facie* case, an arrestor is not confined to the allegations made in the founding papers. It can also rely on what is alleged in its answering affidavit filed in the application to set aside the arrest[14]. Furthermore,

> "*In admiralty cases the evidence tendered and accepted by the Courts for the purpose of establishing a* prima facie *cause of action is almost invariably of a hearsay nature. Even 'double hearsay' evidence from an undisclosed source has been accepted for this purpose (see* The MV Thalassini Avgi *case (*supra*) at 841C-843D). It follows that the level of the test applied is, generally speaking, a low one even in the type of applications for attachment or arrest to which reference has just been made."*[15]

[24] Counsel for UEC contended that the deponent to the founding affidavit failed to disclose the ultimate source of her information in that she describes one of her sources as certain unnamed officers and servants of the respondent. In response to UEC's challenge, the deponent amplified her averments in this connection in the

14 *The MV "Thalassini Avgi"* (*supra*) at 834F-G;
Weissglass NO v Savonnerie Establishment 1992 (3) SA 928 (A) at 936G-I;
Transol Bunker BV v MV "Andrico Unity and others" (*supra*) at 798H-800E.

15 Per **Scott** JA in *The MT "Tigr": Owner of the MT "Tigr" v Transnet Limited* 1998 (3) SA 861 (SCA) at 868H-I

answering affidavit in the following manner:

> *"12.2 I have been advised by Mr Graydon that he and his firm became involved in the dispute between STX Pan Ocean and UEC on 17 June 2005, one day after UEC purported to terminate the charterparty.*
>
> *12.3 When Mr Graydon first received instructions it was from Mr S. R. Kim, and his superior, Mr J. H. Kim, who was the team leader of STX Pan Ocean's insurance and legal department. Mr Graydon was briefed with copies of the correspondence and documents that had been exchanged between STX Pan Ocean and UEC, as well as between STX Pan Ocean and the vessel's sub-charterers VOC Bulk Shipping (USA) Inc ('VOC') and Daeshin Shipping Company Limited ('Daeshin'), as well as the other sub-charterers in the chartering chain.*
>
> *12.4 Several months after the termination of the charter the day-to-day handling of the file at STX Pan Ocean passed to Mr Jae Hoon Kim, an assistant manager in the insurance and legal department still under the supervision of Mr J. H. Kim, the team leader. Mr Jae Hoon Kim is a qualified lawyer. It was Mr Jae Hoon Kim who communicated confirmation of STX Pan Ocean's instructions to Mr Graydon at the time of the arrests in Italy and South Africa.*
>
> *12.5 STX Pan Ocean's insurance and legal department in turn obtained their information from STX Pan Ocean's breakbulk liner operations department and, in particular, from Mr B. J. Chun who was directly involved in the operation of the vessel.*
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> *12.6 STX Pan Ocean's breakbulk liner operations department was directly involved in the calculation of the hire payable to UEC and the deductions to be made from the hire, and in the problems which arose in relation to the bunkering of the vessel at Mina Saqr, Kuwait. The insurance and legal department was copied into the operations department's exchanges from UEC from an early stage in June 2005 and took over exchanges with UEC in and around 16 June 2005. STX Pan Ocean's breakbulk liner operations department were at all times involved in, or kept fully advised of, the frequent difficulties experienced by the sub-charterers in relation to the vessel's operation arising from engine and equipment failures. As a disponent owner in the chartering chain STX Pan Ocean's breakbulk liner operations department was also kept fully advised by sub-*

charterers of the vessel's movements."

[25] In *Thalassini Avgi* the Supreme Court of Appeal held that in applying the provisions of sections 6(3) and 6(4) of the Admiralty Act which permit the reception of hearsay evidence,

> "*Accordingly, in my view the general approach to be adopted in the application of s 6(3) should be lenient rather than strict; the Court should, speaking generally, be inclined to letting hearsay statements go in and to assess the weight to be attached to them under s 6(4) when considering the case in its totality; and the decision to exclude such statements should normally be taken only when there is some cogent reason for doing so."*

In the light of this pronouncement, I conclude that the attack on the deponent's evidence cannot succeed. In her answering affidavit she also stated:

> *"As I have indicated above, Mr Jae (not Gae) Hoon Kim, as manager of STX Pan Ocean's insurance and legal department, was fully aware of the facts and circumstances which are described in the arrest application and in the defence and counterclaim submissions submitted to the arbitrator on STX Pan Ocean's behalf."*

[26] In my view there is also no merit in the submission that the failure to record details of UEC's cause of action resulted in no *prima facie* case being made out in the founding affidavit. The submission is based on the premise that it is fundamental to STX's case that its claims against UEC flowed from the purported termination of the charterparty by UEC. Since the reasons for UEC's termination of the charterparty appear in its claim submissions, it was contended that details of UEC's claim should have been included in the founding affidavit. The following appears in the founding affidavit.

> *"Disputes have arisen between Applicant and First Respondent in connection with the said charterparty, in respect of which arbitration proceedings have been instituted in London for the litigation of such disputes. Applicant avers that it has certain substantial claims against First Respondent arising out the aforesaid charterparty. Applicant holds no security for such claims, and has a genuine and reasonable need for such security…"*

The submission on behalf of UEC was that the inclusion of STX's defence and counterclaim submissions in the founding affidavit was insufficient, particularly in regard to the dispute concerning the supply of bunkers at Mina Saqr. In particular it was submitted that the founding papers lacked averments by someone with knowledge of the facts that the averments in the defence and counter-claim submissions were true. In this connection, counsel submitted that full details of the happenings at Mina Saqr ought to have been disclosed. This issue was dealt with in the following manner in the founding affidavit. The deponent submitted that STX had valid defences to UEC's claim *inter alia* on the basis that

> "*15.1.2 Rather than Applicant* (STX) *failing or refusing to stem bunkers to the vessel as required, such bunkers could not be stemmed owing to Second Respondent* (the Vessel) *being refused entry to port by reason of equipment deficiencies, which deficiencies were the responsibility of First Respondent* (UEC)*."*

The statement that the bunkers could not be stemmed is not entirely correct in that the bunkers were ultimately stemmed. According to STX's defence and counterclaim submissions, the sub-charterers had stemmed bunkers at Mina Saqr, but it appears that the Vessel was unable to enter Mina Saqr due to equipment deficiencies. UEC then arranged for the bunkers to be supplied outside Mina Saqr. STX's case is that since UEC had advised it, before UEC purported to terminate

the charter, that UEC intended to replenish the bunkers, STX's obligation to provide bunkers would have been replaced by an obligation to reimburse UEC for the bunkers once they had been replenished, which obligation they would have fulfilled.

STX's was required to establish on a *prima facie* basis that it had an enforceable claim against UEC in the arbitration proceedings. In my view that did not require STX to give details of UEC's claim. As to the averment that details should have been given as to precisely what happened at Mina Saqr, although the founding papers contain the averment that the bunkers could not be stemmed, this must be read with the full explanation for that statement in the submissions in the arbitration proceedings. It is my view further that even if there was an obligation on STX to provide details of UEC's claim, the defence and counter-claim submissions in effect reveal the nature of UEC's claim.

[27] It is trite that in *ex parte* proceedings an applicant is obliged to observe the utmost good faith in placing all material facts before the court and the failure to do so may result in the order being set aside on the grounds of non-disclosure alone. Furthermore,

* In *ex parte* applications all material facts must be placed before the court which might influence a court in coming to a decision;

* the non-disclosure or suppression of facts need not have been wilful or *mala fide* to incur the penalty of rescission; and
* the court, apprised of the true facts, has a discretion to set aside the former order or to preserve it.[16]

[28] On behalf of UEC it was contended that the founding affidavit falls short of the requirement that all material facts be placed before the court in the following respects:

16 *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 349A-B;
The National Director of Public Prosecutions v Braun and another 2007 (1) SA 189 (C) at para [22] at p196

- Details of UEC's claim in the arbitration proceedings were not disclosed.
- Insufficient and inaccurate details relating to the Italian proceedings were given.
- Insufficient details of events leading up to STX's claim for security of its costs in the arbitration proceedings were provided.

[29] The submissions on behalf of UEC to the effect that STX should have provided fuller details of UEC's claim in the arbitration proceedings and more accurate information as to the taking on of bunkers at Mina Saqr were of course also raised in support of the submission that the founding affidavit in the arrest proceedings did not contain sufficient information to make out a *prima facie* case. My view in regard to these submissions appears in para [26].

[30] As to the Italian proceedings, the following was stated by the deponent to the founding affidavit in the arrest proceedings in this court.

> "*The Applicant* (UEC) *has previously attempted to arrest the Second Respondent* (the Vessel) *within the jurisdiction of the Courts of Italy, but the court of first instance declined to confirm the arrest. The court of final instance in Italy declined to determine an appeal against the order of the court of first instance, on the basis that the vessel had left its jurisdiction by the time the appeal was to be determined and that Applicant as appellant therefore had no material interest enforceable by the appeal court."*
>
> *"Accordingly, the provisional arrest of the Second Respondent in Italy was never confirmed, thereby leaving it open to Applicant to procure the arrest of Second Respondent in any other jurisdiction."*

The description of the proceedings in the Gorizia court is certainly terse, but is accurate, save for the statement that the court of final instance declined to determine the appeal. In fact, the appeal court dismissed the appeal. However,

the reasons for the dismissal are correctly set out in the affidavit. On behalf of UEC, it was submitted that the court had set aside the arrest of the Vessel on the basis that STX's admitted failure to provide bunkers for the Vessel as it was obliged to do in terms of the charterparty, amounted to a breach of the charterparty justifying the termination thereof by UEC. As I have already stated and as will appear from the judgment itself, the court did not make such a finding. It recorded that the parties did not dispute that UEC had failed to pay for the bunkers and then went on to record that such a failure would constitute a breach of one of the obligations arising from the charter which would justify termination thereof, but that STX had submitted that its obligation to pay for the bunkers had been novated. In respect of that alleged novation, the court found that STX had not substantiated its claim because the affidavit submitted by STX was not sufficient, since it was in itself *"but a statement of knowledge having no value".* I have already set out my understanding of the judgment and its effect.

[31] The question to be answered is what fuller details should have been given to the judge who granted the arrest application which might have influenced her decision. As I have already said, the summary of the Italian proceedings was factually correct save for the indication that the appeal court had declined to determine the appeal whereas it had in fact dismissed it. However, the basis for the dismissal was disclosed. Since the Italian court did not make a positive finding that STX's failure to provide bunkers for the Vessel amounted to a breach of the Head

Charterparty and since its refusal to confirm the provisional arrest order was made on the basis that the evidence put before it was insufficient, I do not consider that the provision of fuller details of the reasoning of the court and the appeal court in Italy might have influenced the judge in coming to her decision to grant the arrest application.

[32] The final submission on behalf of UEC under this rubric was that STX failed to place all material information leading up to STX's claim for security before the judge who granted the arrest warrant. The claim for security is advanced in the following terms in the founding affidavit.

> "*26. Applicant has a genuine and reasonable need for the security sought in terms of this application, for the reasons as set out further below.*
>
> *27. The Applicant has no security whatsoever for its counterclaims.*
> *…..*
>
> *29 The Applicant has called on the First Respondent to provide security for the amount of its counterclaim in the arbitration proceedings, but such security has not been provided to date."*

Counsel for UEC referred me to correspondence which had been exchanged between the London solicitors acting for the parties; correspondence regarding the amount which each of the parties required the other to pay into an escrow account as security for their claims commenced on 20 June 2005. The main point made on behalf of UEC is that in a letter dated 4 July 2005 addressed by STX's London solicitors to UEC's London solicitors it was recorded that UEC had not responded to proposals in respect of the furnishing of security made on behalf of STX and that pending a reply, STX's rights were reserved. A copy of this letter was filed with STX's affidavits. It would seem that UEC's counsel was of the view that a reply to

this letter, which had been forwarded to STX's London solicitors on 14 July, was not referred to and that the correspondence in regard to the furnishing of security should have been revealed to the judge who might have been influenced thereby. STX's London solicitor responded in an extra affidavit filed by him in which he pointed out that the letter of 14 July addressed to his firm was marked 'WITHOUT PREJUDICE' as had been other correspondence between the solicitors and it was for that reason he did not consider it proper to refer to the letter. The letter records the following:

> "*Our clients are prepared to secure your clients' claim, including those indicated in your e-mail dated 24th June 2005, on condition that your clients secure the deductions already made from hire, together with the further sum of U.S.$ 1,100.000, representing:"*

In the additional affidavit filed by Graydon, he records that he sent a telefax to UEC's solicitors on the day that he received the letter of 14 July requesting a breakdown of the three figures making up UEC's claim which he indicated appeared to be excessive. He says that neither he nor STX received any breakdown of UEC's claim until its claim submissions were served on 7 October 2005 and the damages breakdown was served on 7 November 2005.

[33] It is difficult to imagine how the judge who granted the arrest warrant might have been influenced had the correspondence in regard to the furnishing of security been made available to her. The fact is that STX required security to be provided for its claim and for whatever reason, no such security was provided.

In *Cometal-Mometal SARL v Corlana Enterprises (Pty) Ltd*[17] the court listed certain factors which should be taken into account by a court in the exercise of its discretion whether to grant or deny relief to a litigant who has breached the *uberrima fides* rule namely, the extent to which the rule has been breached; the reasons for non-disclosure; the extent to which a court might have been influenced by proper disclosure; the consequences, from the point of doing justice between the parties; of denying relief to the applicant on the *ex parte* order and the interests of innocent third parties. Even if there had been a breach of the *uberrima fides* rule, my view is that the breach would have been so slight that I would not have exercised my discretion in favour of UEC. It was not suggested that if additional information relating to the correspondence between the solicitors had been furnished, the order for arrest would not have been made. As to the parties, I am informed that the second applicant is the only ship owned by the first applicant. Therefore, it could certainly be said that the discharge of the order would have created a risk for the respondent.

[34] Having concluded that the applicants have failed to establish their primary claims for relief, it is necessary to consider their alternative claim for counter security. That the respondent, having sought a security arrest in this court, renders itself liable for a claim for counter security is clear from the provisions of section 5(2) of the Act. This provides:

17 1981 (2) SA 412 (W) at 414g-h

"(2)(a) A court may in the exercise of its admiralty jurisdiction –

a) ….

b) order any person to give security for costs or for any claim;

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;

d) notwithstanding the provisions of section 3(8), order that, in addition to property already arrested or attached, further property be arrested or attached in order to provide additional security for any claim, and order that any security given be increased, reduced or discharged, subject to such conditions as to the court appears just."

[35] As pointed out in para 17, an applicant, applying for the arrest of a ship in terms of section 5(3)(a) of the Act bears the onus of establishing, on a balance of probabilities, that it has a genuine and reasonable need for security. The relevant wording in the section is:

> "*A court may in the exercise of its admiralty jurisdiction order the arrest of any property for the purpose of providing security for a claim which is or may be the subject of an arbitration or any proceedings contemplated, pending or proceeding, either in the Republic or elsewhere, and whether or not it is subject to the law of the Republic, if the person seeking the arrest has a claim enforceable by an action* in personam *against the owner of the property concerned or an action* in rem *against such property or which would be so enforceable but for any such arbitration or proceedings."*

[36] Unsurprisingly, in view of the authorities on this issue, counsel were not in agreement as to the test which is to be applied in establishing that counter security is to be furnished. The difficulty stems from the different approaches adopted by the courts in different divisions of the High Court. In this division, the courts have

consistently held that an applicant for counter security must satisfy the same requirements as must be satisfied for an arrest in terms of section 3(a) of the Act. This means that in such a case an applicant must show that it has a genuine and reasonable need for such security[18].

This approach was also followed in the Eastern Cape[19].

[37] In the Durban and Coast Local Division a different approach has been adopted. The effect of the decisions in this division is that while security will not be ordered to be given if there is no case or need for it, to require that the need to be genuine and reasonable is inconsistent with the unfettered discretion of the court[20].

[38] Respondent's counsel relied heavily on the judgment of **Southwood** AJ in the *Samsung Corporation* case. After undertaking an exhaustive survey of the case law, the learned judge concluded that because of the wide discretion afforded to a court to order counter security in terms of section 5(2) of the Act, as also the difference in wording between that section and section 5(3)(a), the court's discretion ought not to be fettered by an applicant having to establish that its need for security is genuine and reasonable. He also did not agree with the view

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18 *Devonia Shipping Limited v MV "Luiz"* 1994 (2) SA 363 (C) at 374B-C;
The Catamaran "TNT" (No. 1) 1997 (2) SA 383 (C) at 394C-E;
The MV "Rizcun Trader (4)" 2000 (3) SA 776 (C) at 804I-J;
The MV "Heavy Metal" 2000 (1) SA 286 (C) at 298E-I;
The MV "Akkerman" 2000 (4) SA 584 (C) at 592B-F.

19 *The MV "Millennium Amanda"* 2002 SCOSA B141 (SECLD) at B151G-H

20 *Samsung Corporation v Silver Cape Shipping Limited, Malta* [2005] 1 All SA 67 (D);
Guangzho Maritime Corp v Dry Bulk SA 1997 (2) SA 454 (D) at 463E.

expressed in the *MV "Rizcun Trader (4)"* case that the content for the discretion which paras (b) and (c) of section 5(2) conferred on the court is to be found in the decisions relating to section 5(3) of the Act. In the *Yu Long Shan*[21] case, a case relied upon by **Southwood** AJ, the court held that in maritime litigation between the peregrine plaintiff and the peregrine defendant, the following should apply[22]:

> "*As far as the 'genuine and reasonable need' for security is concerned, I think that the requirement really pertains to the s 5(3) situation. As long as a defendant and prospective plaintiff in reconvention satisfies the Court that he has a* prima facie *claim on which he could not execute if successful, it seems to me that the need for security in respect of a peregrine plaintiff is established and follows as a matter of course."*

Southwood AJ plays down the significance of the court's finding that in such event the need for security would follow as a matter of course by

1. Pointing out that the leaned judge did not say that the test set out was the only test to be applied; and
2. Highlighting the reluctance of the court to lay down a test for quantifying the need for security.

I do not agree with this view. The view of the learned judge in the *Yu Long Shan* case that the need for security to be afforded to a counter-claimant once it satisfied the court that it had a *prima facie* claim followed on an analysis of previous judgment and is clearly stated. I respectfully disagree with that view. Similar disagreement was also expressed in this division in the *MV "Heavy Metal"*, the *MV "Rizcun Trader (4)"* and the *MV "Akkerman"* (all *supra*).

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21 *Yu Long Shan: Guangzho Maritime Corp v Dry Bulk SA* 1997 (2) SA 454 (D)
22 At 463E-F

[39] In the *MV "Heavy Metal"* (cited with approval in the *MV "Rizcun Trader (4)"* and the *MV "Akkerman"* judgments)[23], **Comrie** J said the following:

> "*Having reviewed the case law, I may be permitted some observations of my own. In the first place, it is evident that s 5(2)(a)-(c) of the statute vests the Court with a wide poser, in its discretion, to order that security or counter security be furnished for claims and counterclaims. Secondly, confining myself to counterclaims, clearly the Court must have jurisdiction, which is invariably present in the circumstances. Thirdly, it seems to me that an applicant must show at least a* prima facie *case in respect of its counterclaims(s). I say 'at least' because less would not warrant security, while in my view more may be required in an appropriate case. Fourthly, I think an applicant must show a genuine and reasonable need for security. Respectfully disagreeing with Hurt J in the* Yu Long Shan *case* supra*, I do not think this follows as a matter of course. Finally, the Court has a discretion which in my opinion should not be unduly circumscribed. All sorts of factors can arise in different cases which may affect the exercise of the discretion, such as whether the arrest was in terms of s 5(3); the location of the forum; whether the arresting party is a* peregrinus *of this Court; the nature of the counterclaims; and the effect that a 'forfeiture' order may have on the arrestor's position (cf Foxcroft J,* supra*). The list is not exhaustive. The Court may find itself weighing and balancing competing interests. The strength of the counterclaimant's case on the merits may then become a factor to be weighed in the balance. It follows from all this that I do not necessarily find myself in the 'sparing' school of thought, but that I do recognise a substantial need for caution."*

Although disagreeing with the view that a genuine and reasonable need for security must be shown, **Southwood** AJ approved the last six sentences in the extract quoted from the judgment of **Comrie** J.

[40] The difference of approach in the two divisions boils down to this. In this division, a counterclaimant for security must establish a reasonable and genuine need for

23 See footnote 18

such security. The court then has a wide discretion in deciding whether or not to order security to be furnished. It is worth noting that in respect of a security arrest in terms of section 5(3) of the Act where the applicant has in terms of the case law to show a genuine and reasonable need for security, the court similarly has a wide discretion to make such an order. In the Durban and Local Division the discretion is to be exercised, starting as it were, with a clean sheet, but it would seem that the sheet is not entirely clean, for as **Southwood** AJ himself says:

> "*Plainly if the need for security is not shown, an order may not be made for a person to furnish it."*

So, in both divisions a need for security must be shown and that all that is in issue is the difference in describing the level of that need. The difference in approach may well be nothing more than one of semantics for it seems that it will be difficult to identify the difference in practice. Gys Hofmeyr, while of the view that the argument advanced by **Southwood** AJ is compelling, points out that

> "…*its application is unlikely to result in any difference in practice having regard to the conventional view that despite the requirement that the need must be genuine and reasonable, the Court retains an overriding discretion to refuse to order security to be furnished.* [24]*"*

[41] I am not persuaded that the view adopted in this division is clearly wrong and respectfully associate myself with the view of **Comrie** J in the *Heavy Metal* case quoted in para [39]. The approach to be adopted in the last six sentences of the quotation from the judgment makes it clear, in my view, that in all probability the

24 Admiralty Jurisdiction Law and Practice in South Africa, Juta Law 2006 at p123.

result will be the same, whichever test is applied.

[42] STX does not dispute that the evidence before the court reflects that it has a *prima facie* case in respect of its claim in the London arbitration proceedings. It takes the view that UEC has to establish a genuine and reasonable need for such security and denies that such need has been established. UEC's case is that even if it has to establish a genuine and reasonable need for security, that has been established by virtue of the facts and circumstances prevalent in the matter, and in particular, that it has no security at all for its claim. On behalf of UEC, it was pointed out that the parties were attempting to agree on the amount of security which was to be furnished for UEC's claim before negotiations broke down. It is also contended that UEC has no assurance from STX that if it is successful in the arbitration, STX will be able to pay the amount of its claim. The point is made that it would have to launch proceedings in South Korea to enforce any award and that such proceedings could take up to three years after the grant of an award. STX's financial circumstances are set out in the papers. These reveal that it is one of the world's largest ocean carriers, operating 250 vessels and that it and the companies within its group own 24 bulk carriers, four container vessels, seven tankers and two car carriers. It also has 17 vessels on long-term time charter and two vessels on order for delivery in 2007. It is the registered owner of 43 vessels. During the latter part of 2005 STX was listed on the Singapore stock exchange with a value of Singapore $621 million. Its financial results for the second quarter ending June

2006 reflected assets valued at US $1.3 billion. Its vessels call at Cape Town and other South African ports on a regular basis. The information in regard to its financial position is not in dispute. In these circumstances, UEC's claim for security is in fact based on a consideration of convenience. In the *MV "Rizcun Trader (4)"* it was held that this was not a sufficient basis for an order that security be furnished[25]. Relying on the judgment in the *Peregrine III*[26], counsel for UEC submitted that whatever the position might be now, there is no guarantee as to what STX's position will be in the future. In that case, **Davis** J after referring to the fact that the shipping industry is notoriously volatile, concluded that there was overriding principle that the present financial status of the respondent was a material factor to be taken into account in determining the *quantum* of the security to be furnished. His finding accordingly related to the *quantum* and did not extend, as I read his judgment, to the statement of a principle that the present financial status of a party should not be a material factor to be taken into account in determining whether or not security was to be furnished.

[43] A final issue to be taken into account is the fact that the arbitration proceedings are well advanced, STX having delivered its defence and counterclaim submissions in May of last year.

[44] Having taken all the considerations into account, I have come to the conclusion

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25 *The MV "Rizcun Trader (4)"* 2000 (3) SA 776 (C) at 805C-E

26 1999 SCOSA B73 at B79-80

that my discretion should not be exercised in favour of UEC. I have reached this conclusion from the starting point that UEC had to establish a genuine and reasonable need for security. However, even if UEC only had to establish a need for security, whatever such lesser test might entail, I would still have come to the same conclusion. Obviously, if the financial position of STX were to change for the worse in the future, it would be open to UEC to renew its claim for counter security.

[45] The applicant also sought a reduction of the amount which it had been ordered to furnish as security in case no AC 111/2006 in this division. I was advised that after the institution of proceedings, this aspect was resolved to the satisfaction of the parties. Its resolution had a minimal impact on the proceedings and did not result in any cost implications.

[46] UEC's counsel resisted the admission of further affidavits which were filed on behalf of STX in November of last year. The case for STX was that these papers were necessary in order to deal with new matter raised in replying affidavits filed on behalf of UEC which it was prevented from striking from the record by virtue of the provisions of Admiralty Rule 9(3)(c). In my view the further affidavits were permissible since specific paragraphs of the replying affidavit were dealt with and additional Italian authorities were provided in response to authorities which had been provided in the answering affidavits.

[47] In the circumstances, the following orders are made:

1. The application to set aside the arrest of the *MV "Wisdom C"* is dismissed.
2. The applicant's counter application for security for its claim in the arbitration proceedings pending in London is dismissed.

3. The applicant is to pay the respondent's costs in respect of the main application and the counter application which costs are to include the qualifying fees of Messrs Graydon, Kimbell and Battini.

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R B CLEAVER