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1]IN THE HIGH COURT OF SOUTH AFRICA

2](CAPE OF GOOD HOPE PROVINCIAL DIVISION)

3](Exercising its Admiralty Jurisdiction)

4]Case No AC 104/07

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6]Name of Vessel: MV *Visvliet*

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8]In the matters between:

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10]**GOLDEN INTERNATIONAL NAVIGATION SA** Applicant

11]

12]And

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ZEBA MARITIME COMPANY LIMITED Respondent

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15]**CASE NO AC 41/97**

16]

ZEBA MARITIME COMPANY LIMITED Plaintiff

And

MV *VISVLIET* ***Defendant***

17]

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19]JUDGMENT DELIVERED: 28 NOVEMBER 2007

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21]GRIESEL J:

Introduction

22]The history of this litigation commenced more than a decade ago, on 14 March 1997, when Zeba Maritime Company Limited (*the plaintiff*), a company registered in Athens, launched an admiralty action *in rem* in this court under Case No AC 41/97 (*the main action*) against the vessel MV *Visvliet* (as defendant) for payment of US $82 282.31 in respect of the purchase price of bunkers sold and delivered by the plaintiff to the defendant. The defendant vessel was arrested on the same date, but was subsequently released after security for the claim had been duly furnished on its behalf.

23]In particulars of claim subsequently filed, two further amounts were added to the plaintiff's claims, which were formulated as follows:

(a) During December 1996 the plaintiff and the owner of the vessel, represented by 'an employee of the Managers of the defendant, Sateda Shipmanagement BV' (*Sateda*), concluded an agreement in terms of which the plaintiff sold and delivered to the owner of the vessel certain lubricants as ordered on 25 December 1996 to the value of US $6 223,05 and on 4 February 1997 to the value of US $9 404,03.

(b) On or about 31 January 1997, one Fred Bolland, 'an employee of the managers of the defendant, Sateda, acting on behalf of

the owner of the vessel', concluded a further agreement with the plaintiff for the sale and delivery of a quantity of bunkers to the vessel at Singapore as ordered.

24]According to the plaintiff, the owner of the vessel failed to pay the amounts owing in respect of the lubricants and bunkers, being the total sum of US$97 907.39, which amount is being claimed from the defendant as a 'maritime claim', as contemplated by s 1(1)(*m*) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (*the Act*).

25]Golden International Navigation SA (*GIN*), a company registered in Panama and claiming to be the owner of the vessel, filed a plea in which it denied, *inter alia*, that it or anyone on its behalf entered into any contract with the plaintiff. It also denied that Bolland or Sateba was its agent and denied that either of the two had any authority to enter into any contract on behalf of the owner.

26]Further particulars were requested and furnished; discovery was called for and made; further discovery was called for in terms of Uniform Rule 35(3); and various interlocutory applications were launched, *inter alia*, one by the defendant for security for costs and one by the plaintiff to compel delivery of trial particulars. Finally, on 10 September 2001, the plaintiff (belatedly) filed a replication in which it denied that GIN was the owner of the vessel or that it had *locus standi* to defend the action on behalf of the vessel.

27]At that stage, the matter became dormant and remained so until June 2006, when GIN eventually took the initiative by setting the action down for trial. At the same time, it launched an application for an increase in security for costs. The plaintiff opposed this application and, in turn, launched two interlocutory applications of its own – one for an increase in the security already provided by GIN for the plaintiff's claim and the other to compel further discovery. Both of these applications are being opposed by GIN.

28]While the interlocutory applications were pending, GIN launched a substantive application (under Case No AC 104/07) to strike out the plaintiff's claim the basis that it is vexatious and/or an abuse of the process of the court. It is that application which forms the subject matter of the present judgment.

Legal principles

29]In terms of rule 20(1) of the Admiralty Rules, 'the court may strike out any proceedings which are vexatious or an abuse of the process of the court'. I have not been referred to any decision where this rule has been pertinently invoked, nor have I been able to find any such decision. In the absence of any definition or binding authority to the contrary, I have no doubt that the rule contemplates that the common law principles should be applied whenever this rule is invoked by a litigant.

30]It is well settled at common law that 'every court has an inherent right to prevent an abuse of its process in the form of frivolous or vexatious litigation'.[1] An action may be held to be vexatious if it is 'obviously unsustainable',[2] or 'frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant'.[3] A factor that is often taken into account by the courts when considering whether a particular proceeding amounts to an abuse of the process is the fact that there has been an inordinate delay in proceeding with the action.[4]

31]The present application rests on a twofold basis: first, the perceived lack of merit in the plaintiff's claim to the extent, so it is claimed, that it is 'unsustainable'; and, second, the inordinate delay and the failure on the part of the plaintiff to prosecute its claim.

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1 *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 271. See also *Fisheries Development Corporation of SA Ltd v Jorgensen & Another*1979 (3) SA 1331 (W) at 1338F–G; Harms *Civil Procedure in the Superior Courts* (1990 with loose-leaf updates) p A3.5 (Service Issue 34); Herbstein & Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4ed (1997) pp 247–248and 546–547.

2 *Ravden v Beeten* 1935 CPD 269 at 276; *African Farms & Townships v Cape Town Municipality* 1963 (2) SA 555 (A) at 565D–E.

3 *Fisheries Development Corporation of SA Ltd v Jorgensen & Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd & Others* above n 1 at 1339E–F; *Bisset & Others v Boland Bank Ltd & Others* 1991 (4) SA 603 (D) 608D–E.

4 *Schoeman en Andere v Van Tonder* 1979 (1) SA 301 (O) at 305A–F; *Kuiper & Others v Benson*1984 (1) SA 474 (W) at 476H–477A; *Molala v Minister of Law and Order & Another*1993 (1) SA 673 (W) at 676B–679I; *Bissett & Others v Boland Bank Ltd & Others*1999 (4) SA 603 (D) at 608C–E; *Sanford v Haley NO* 2004 (3) SA 296 (C) para 8.

Lack of merit

32]The plaintiff's action *in rem* is brought in terms of s 3(4)(*b*) of the Act. For the plaintiff to succeed, it must prove that the owner of the property to be arrested would be liable to it in an action *in personam* in respect of the cause of action concerned.

33]The plaintiff's first difficulty is that it does not know who the owner of the vessel was at the relevant time. It initially denied in its replication that GIN was indeed the owner, but has applied to withdraw that denial and to replace it with an allegation that it has no knowledge of that fact. The high-water mark of the plaintiff's attempt to establish a contractual *nexus* between itself and the owner of the vessel is to be found in the witness statement[5] of a certain Ms Mairini Stefanides, an employee of the plaintiff, who states that during the latter part of January 1997 she was contacted by Bolland of Sateda, who placed the order for the lubricants and the bunkers with the plaintiff and who allegedly 'confirmed to her that he acted on behalf of the owner of the MV *Visvliet*'. (No mention is made as to the identity of the owner.)

5 Filed in compliance with the erstwhile rule 37A(16)(*a*).

34]Leaving aside for the moment the inherent unreliability of the hearsay evidence tendered, the more fundamental difficulty with the plaintiff's evidence is that 'it is, of course, clear that the fact of an agency cannot be established from the declarations of the alleged agent.'[6] Or, as it was put by Wigmore:[7]

> *35]'The fact of agency must of course be somehow evidenced before the alleged agent's declarations can be received as admissions; and therefore the use of the alleged agent's hearsay assertions that he is agent would for that purpose be inadmissible, as merely begging the very question.'* [8]

36]The case for the plaintiff is further weakened when the evidence put up in rebuttal on behalf of GIN is considered. In the witness statement (under oath) by its President, Mr Pablo Espino, he denies that GIN had appointed Sateda as its agents in respect of the vessel. Moreover, he explains that, after GIN acquired the vessel in June 1996, it was demise-chartered to Miraflora Shipping Incorporated (*Miraflora*) as bareboat charterers, from which date the vessel was completely under the control of Miraflora.

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6 *Rosebank Television & Appliance Co (Pty) Limited v Orbit Sales Corporation (Pty) Limited* 1969 (1) SA 300 (T) at 303D–E, with reliance on *R v Koro* 1950 (3) SA 797 (O) at 802F–G and *Strathsomars Estate Co Ltd v Nel* 1953 (2) SA 254 (E) at 257B. See also *Covary v Registrar of Deeds and Others* 1949 (2) SA 719 (A) at 728; *Van Niekerk v Van den Berg* 1965 (2) SA 525 (A) at 537F–G.

7 4 Wigmore *Evidence* (1972) §1078 at p 176.

8 In footnote 5, the learned author cites numerous American authorities for this proposition, eg: 'Agency and authority cannot be proved by the hearsay statements of the alleged agent himself'; and '[t]he authority of an agent cannot be proved by the declarations of the agent.'

37]These allegations are borne out by the documentary evidence discovered by both GIN and the plaintiff. Thus, the plaintiff's bunker receipts confirm that it was indeed Miraflora which fuelled and operated the vessel at the relevant time and that Sateda was acting as Miraflora's managing agents.

38]The result is that, both in terms of the demise charter in question and the applicable law, Miraflora – and not the owner – was responsible to bunker the vessel at all relevant times.[9]

39]Against this background, it is clear to me that the hearsay allegations of Ms Stefanidis as to what she had been told by Bolland do not carry much weight. I am accordingly driven to the conclusion that the plaintiff is not in a position to prove that it has a sustainable claim *in personam* against the owner of the vessel.

Delay

40]With regard to the question of delay, it appears that the pleadings were closed ten days after the filing of the defendant's plea on 18 March 1998.[10] After that date, certain pre-trial steps were admittedly taken by both parties.

9 Cf *Shipping Law and Admiralty Jurisdiction in South Africa*(1999) p 583; Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa* p 105, and the cases referred to in footnotes 52 and 53 on that page.

10 In terms of Admiralty rule 9(2)(*c*).

However, it is undisputed on the papers before me that, during the entire period between 2001 and 2006, the plaintiff did not set the matter down for trial, nor did it take *any* further steps to bring the matter to finality. The only explanation for this inactivity is the terse statement that 'the plaintiff was unable to advance its action due to administrative funding problems'.

41]I am not impressed by this statement, which neither explains nor excuses the plaintiff's inactivity, nor am I impressed by the plaintiff's belated reliance on the provisions of s 34 of the Constitution. While everyone undoubtedly has the right to have any dispute decided in a fair public trial before a court, there are rules governing any public trial. One of the most fundamental principles in this regard is that it is in the public interest that litigation be finalised without undue delay: *interest reipublicae ut sit finis litium*, as it was stated by the Romans many years ago. Indeed, Emperor Justinian, in Codex 3.1.11, decreed that civil suits shall not, after *litis contestatio*, be deferred longer than three years.[11] The potential 'tyranny of litigation', aggravated by undue delay, has also been recognised by our courts on many occasions[12] and every system of civil procedure has rules to curb violation of the rules and abuse of its process.[13]

11 See *Sanford v Haley NO* above n 4 at 299H–I.

12 Cf *Juta & Co Ltd v Legal and Financial Publishing Co (Pty) Ltd* 1969 (4) SA 443 (C) at 445F; *Vollenhoven v Hoenson & Mills* 1970 (2) SA 368 (C) at 372B; *Chopra v Avalon Cinemas SA (Pty) Ltd and Another* 1974 (1) SA 469 (D) at 472H.

13 Cf *Western Assurance* case, footnote above, *loc cit.*

42]The crisp question for decision is whether the delay in this instance has been so unreasonable or inordinate as to amount to an abuse of the process of the court.

43]A useful starting point is to be found, in my view, in the comment by Flemming DJP,[14] that 'reasonableness would then be influenced, *inter alia*, by the reasons for a plaintiff's delay – an issue on which the present plaintiff is completely silent'. In this instance the plaintiff, although not silent, has furnished a wholly unacceptable explanation.

44]Further guidelines regarding the question of reasonableness are to be found in the provisions of rule 37A which, notwithstanding its repeal, is still applicable to this matter.[15] The principal aim of that rule was to create a measure of judicial control over a process that is otherwise left entirely in the hands of practitioners.[16] Thus, the rule makes provision for directions to be issued by a judge after the 'entry date' (which occurs at the close of pleadings) and for a timetable to be determined within which to comply with such directions. A 'compliance date' must be fixed, which must not be later than *eight months* after the 'entry date'.[17] If, at the compliance date, a matter is still

14 *Molala* above n 4 at 676G.

15 GN R373, 30 April 2001, para 3(2).

16 Cf *Molala*above n 4 at 679D.

17 Subrule (5)(j).

not ready for trial, it may be referred to the 'not ready list', which has to be maintained by the registrar.[18] If a matter has been on the not ready list for *three months,* a default hearing must be held unless the plaintiff applies to have the matter removed from such list.[19] Finally, where proceedings have remained on the not ready list for more than *twelve months*, the registrar shall refer the matter to the judge president, 'who shall make such orders as he or she considers necessary … including, where appropriate, orders as to costs and for the dismissal of the action'.[20] Thus, the rule envisages a period of roughly *two years* from the date of inception of the action until final disposal. The present matter would ordinarily have already surpassed that milestone as long ago as some time during 1999.

45]A further indication as to the reasonableness of delay in the context of maritime claims is to be found in s 3(10)(*a*)(ii) of the Act, which provides that property deemed to have been arrested or attached 'shall be deemed to be released and discharged therefrom if no further step in the proceedings, with regard to a claim by the person concerned, is taken within *one year* of the giving of any such security or undertaking'. (Emphasis added.) In the present instance, the plaintiff did take further steps within the period of one year after

18 Subrule (14)(j), read with subrule (15)(a).

19 Subrule (15)(b).

20 Subrule (15)(f).

security was furnished on behalf of the defendant. I accept, therefore, that the provisions of the section do not apply literally to the present situation. Nonetheless, the provisions in question are a clear indication, in my view, that it was not contemplated that security would remain in place indefinitely while the *dominus litis* takes no steps to bring matters to finality. It also provides an indication of the time period regarded as reasonable in this context.

46]Judged by all these yardsticks, it is clear to me that the delay on the part of the plaintiff in the present matter is unreasonable and should not be condoned by this court. I am fortified in this conclusion by a dictum of Denning LJ in *Krakauer v Katz*,[21] to the effect that –

> *47] '…if a plaintiff allows an action to go to sleep for six years, the Court in its discretion will usually dismiss the case for want of prosecution, unless the plaintiff can show some good reason why he should be allowed to go on with it'.*

48]The fact that the present plaintiff allowed the present action 'to go to sleep' for approximately five years (and not six) makes no difference to the principle involved. I have no doubt that similar reasoning should apply to the present matter. No good reason has been shown by the plaintiff why it should now – more than ten years after the cause of action arose – be allowed, at great

21 [] 1 All ER 244 (CA) at 246A, quoted with approval by Brink J in *Schoeman en Andere v Van Tonder* above n 4 at 305B.

expense, to proceed with a claim that appears to be doomed to fail.

Conclusion

49]I am mindful of the fact that the court's power to strike out a claim on the basis that it is vexatious or an abuse of its process is an exceptional one which must be exercised with very great caution, and only in a clear case. However, I respectfully disagree with *dicta* that go further by requiring that this conclusion 'must appear *as a certainty* and not merely on a preponderance of probability.'[22] (My emphasis.) This requirement appears to originate from a *dictum* in the minority judgment of Holmes JA in the *African Farms & Townships* case. The two cases[23] cited by the learned judge of appeal in support of this proposition do not, however, provide such support. Furthermore, the proposition flies in the face of our rules of evidence, by which a preponderance of probability in favour of a litigant is sufficient to decide any civil case in favour of such litigant. (Even the most serious criminal charge is decided beyond reasonable doubt, and not with 'certainty'.) I accordingly respectfully decline to follow the authorities that appear to lay down such a requirement.

50]For the reasons furnished above, I am of the view that the plaintiff's action

22 *African Farms & Townships* above n 2 at 565D–E; followed in *Bisset's* case above n 3 at 608F–G.

23 *Ravden v Beeten* above n 2 at 276; and *Burnham v Fakheer* 1938 NPD 63.

'obviously unsustainable'. Coupled with the inordinate delay and the failure on the part of the plaintiff to prosecute its claim to finality, it is clear to me that the continuation of the plaintiff's action will be vexatious and hence an abuse of the process of this court, as contemplated by rule 20(1) of the Admiralty rules as well as the common law.

51]In the circumstances, the following order is granted:

(a) The plaintiff's action under Case No AC 41/97 is struck out.

(b) The letter of undertaking dated 6 November 2003, issued by Nedbank Ltd in favour of the plaintiff, is to be returned to the applicant forthwith.

(c) The plaintiff (respondent) is ordered to pay the costs of the main action, as well as this application under Case No AC 104/07, such costs to include the costs of two counsel.

(d) With regard to the various interlocutory applications which are still pending, no orders are made, save that the plaintiff is ordered to pay the costs of those applications,

including the costs of two counsel. This part of the order is provisional and shall become final unless written notice is given by either party within 10 days from date of this judgment, requesting the court to reconsider this aspect of the order.

52]_____

53]**B M GRIESEL**
Judge of the High Court