

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER:

AC107/2009

DATE:

22 JANUARY 2010

5 In the matter between:

ANYANG STEEL INTERNATIONAL CO. LTD

Applicant

and

THE OWNERS OF THE MV ALINA II1<sup>st</sup> RespondentPOLEMBROS SHIPPING LIMITED2<sup>nd</sup> Respondent10 PRIMA SHIPPING CORPORATION3<sup>rd</sup> RespondentTHE MASTER & CREW OF THE MV ALINA II4<sup>th</sup> RespondentSMIT SALVAGE BV5<sup>th</sup> RespondentTRANSNET NATIONAL PORTS AUTHORITY,A DIVISION OF TRANSNET LIMITED6<sup>th</sup> Respondent15 HARBOUR MASTER, SALDANHA BAY7<sup>th</sup> RespondentS A MARITIME SAFETY AUTHORITY8<sup>th</sup> RespondentKUMBA IRON ORE9<sup>th</sup> RespondentTHE UNDERWRITERS OF THE CARGO LADENABROAD THE MV ALINA II10<sup>th</sup> Respondent

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J U D G M E N TDAVIS, J:

25 I do not propose to giving a detailed judgment. I appreciate

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however that I may have to give more detailed reasons which will be forthcoming if party so requests. The reason, apart from time, is that to a very large degree, matters have now been resolved, pursuant to the third draft order which applicant  
5 has placed before this Court. Accordingly, what I propose is simply to indicate where I will make amendments to the draft which has been put up by Mr Fitzgerald and Mr Wragge, who appear on behalf of applicants. I will then provide brief reasons as to why, on certain other issues, I have not been  
10 inclined to accept submissions that had been made.

The order before me: Paragraph 1 and 2 remain as is. I do not see no reason to change any. Paragraph 3 should read:

15           “The applicants directed to commence the transhipment of the cargo 175902MTO from the vessel alongside the berth without delay, subject to any lawful direction.”

20   In paragraph 4, the words “any lawful direction” in the second line should be qualified with the further phrase, “as to the manner of transhipment”. Finally I propose to insert clause 9 of the harbour authorities clause, as opposed to the existing clause 11 of the draft.

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That brings me to deal with two further questions. Firstly, the harbour authority, the sixth and seventh respondent, have submitted with a considerable amount of tenacity that there must be provision of security. The argument is that the  
5 harbour authority should not be placed in financial jeopardy and hence security should be provided to them. The counterargument has been at least twofold: Firstly, Mr Fitzgerald referred me to section 18 of the Wreck & Salvage Act 94 of 1996, where in particular section 18(3) read together  
10 with subsection (1) and (2) empowers the South African Maritime Safety Authority to recover expenses from the owner of a wreck or ship in question.

The point which was made was that this Court does not have  
15 the authority, as it were, to order security from a person in the position of applicant, namely the owner of cargo as opposed to the owner of the vessel. Secondly, Mr Stewart submitted that, in no way, was this particular claim prefigured in the papers generated by the sixth and seventh respondent in express  
20 terms, sufficient to enable to deal properly with the matter, particularly given the urgency of this application.

There is a counter to this argument, Mr McKenzie referred me in particular to the Almerinda judgment, (judgment of Magid, J  
25 of 13 June 1994). There the Court relied on section 5(2) of the

Admiralty Jurisdiction Act in support for the finding that a Court, in the exercise of its admiralty jurisdiction (I add that that is the jurisdiction under which this Court now operates) is empowered in its discretion, to order the furnishing of security  
5 or the liability for costs expenses, loss or damage caused or likely to be caused. Furthermore, in that case, the Court accepted that the relevant party could approach the Court at the time of the hearing for an exercise of its discretion, notwithstanding, that it was based upon an argument which  
10 had not been foreshadowed in the papers.

In my view, given the discretion which is available to this Court, it would constitute an injustice for an innocent cargo owner to have security imposed upon it in the circumstances of  
15 this particular case, where its sole concern is the preservation of the integrity of that which it owns. It is not its fault, nor has it been suggested that it could be that its cargo is housed in a vessel which has allegedly caused the difficulties which have given rise to this application.

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The second point relates to the question as to whether security be imposed upon the first, second and third respondent. I am persuaded, notwithstanding my learned brother, Magid, J's approach to the contrary, that in a case such as this, where  
25 almost thousand pages of paper are generated that the

argument should have been foreshadowed in the application. It seems to me that if courts are to be inundated with complicated cases such as the present dispute, with arguments which are raised from the bar, at the eleventh hour, without affording the court the benefit of experience senior counsels' submissions to the contrary, because counsel has been caught unawares, the Court should be very reluctant to exercise its discretion.

10 In addition, what fortifies this conclusion is the various *caveats* in the order which provide protection for the sixth and seventh respondent.

The final question relates to costs. In my view, insofar as the sixth, seventh and ninth respondents are concerned, there is no basis to order the applicants to pay their costs. I so conclude for at least two reasons. The one is the papers indicate that meetings took place prior to this application being launched. If meetings took place prior to this application being launched, it appears particularly in the light of the negotiations that in effect took place both within and outside the courtroom on this day, that the sixth and seventh respondent could have crafted the response which may have obviated some of the difficulties with which this Court is confronted and, therefore, the nature of the application that was brought by the

applicants.

In my view, this is a case where the sixth, seventh and ninth respondents should pay their own costs, particularly the ninth  
5 respondent, whose general approach to this matter seemed to be no more than to supplement to the submissions of sixth and seventh respondents. Furthermore, in this particular regard, Mr Cooke who appeared, together with Mr McKenzie, for the sixth and seventh respondent, and who argued this particular  
10 point, suggested that much of what the sixth and seventh respondents had said, had proved to be very useful. That is true, but that supports my conclusion, that the useful nature of those submissions could have obviated the difficulties with which I was encountered, had they been raised initially.

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I turn to the question of the costs which applicant seeks against first, second and third respondents. Mr Stewart suggested that were I to approach the matter in this way, I would be subjected to a very long and complicated argument,  
20 which I presume was designed in part to deter a robust approach to costs by a Court on a late Friday afternoon. Robustness should not be linked to time, it has to be connected to determining the question of what is contained in the papers. What is in the papers, indicates a fairly ferocious  
25 opposition to the application in the first place, including


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matters of jurisdiction, *locus standi* and a host of other ancillary questions.

It may well be that Mr Stewart is correct that there was a legal  
5 option open to the applicants with regard to the manner in  
which they could have vindicated their rights through the route  
of contract. The fact remains that, in the light of what has  
occurred in this court, the opposition, had it not been so  
strident, might have produced different results and I cannot  
10 help but conclude that the applicant was forced to come to  
court to gain the result which I have essentially formulated  
with the help of counsel. Accordingly, and for that reason, I  
am going to make the order of costs against first, second and  
third respondents which is contained in the draft order. In  
15 summary, the order is that which was produced by the  
applicants as a third draft order, subject to the amendments  
that I have so indicated.

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DAVIS, J