Reportable

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)
(exercising its Admiralty Jurisdiction in terms of Act 105 of 1983)

Case No: AC40/10

Name of Ship: **MV *ALINA II***

In the matter between:

TRANSNET LIMITED Applicant

and

THE OWNER OF THE MV *ALINA II* First Respondent

THE DEMISE CHARTERERS OF THE MV *ALINA II* Second Respondent

Court: GRIESEL J

Heard: 14 September 2010

Delivered: 20 October 2010

JUDGMENT

GRIESEL J:

[1] This is the extended return day of a rule *nisi* granted *ex parte* by Baartman J on 23 March 2010. In terms of the order, the sheriff for the district of Vredenburg was authorised and directed to attach 'the first and second respondent's right, title and interest in the MV *Alina II* and her bunkers ("the vessel")'. The application was brought for purposes of 'founding and/or confirming the jurisdiction of this court' for a claim *in personam* that the applicant, Transnet Limited (Transnet), intends instituting against the respondents for payment of some R45 million, together with interest and costs.

[2] The owner of the vessel, a *peregrinus* in this court,[1] has been cited as the first respondent, with the demise charterers of the vessel being joined as the second respondent. However, it became common cause (for purposes of the present application at least) that there are no demise charterers in relation to the vessel, with the result that the second respondent as cited has fallen out of the picture. I accordingly refer to the owner of the vessel herein simply as 'the respondent'.

Factual background

[3] At the time the order was granted, the vessel – a bulk carrier – was berthed at the Langebaan Iron Ore Terminal in the port of Saldanha Bay. The vessel berthed and commenced loading a cargo of Sishen iron ore on 29 October 2009. The loading operation was completed on 31 October 2009, when it was noticed that the vessel had taken on a port list

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[1] Pompey Shipping Corporation of Monrovia, Liberia.

and her draught/trim had changed by approximately 50cm by the head. Subsequent investigations revealed that the vessel's hull had pre-existing damage and that there had been ingress of water into one of the ballast tanks, caused by a fracture in the hull. As a result of the damage and the fracture, the vessel could not safely depart from the terminal as the damage rendered her unseaworthy. In the result, the cargo had to be discharged to other smaller vessels, which entailed a difficult and time consuming operation. The vessel ultimately only left the berth and sailed from Saldanha Bay on 27 March 2010, ie some five months later.

[4] The port of Saldanha Bay is operated by Transnet. Its port operations are divided into two divisions: Transnet National Ports Authority (TNPA), which *inter alia* manages the marine operations of the port, and Transnet Port Terminals (TPT), which manages the cargo handling operations. The particular terminal at the Saldanha Bay harbour consists of two berths. As a consequence of the vessel's continued occupation of the one berth, only one berth was available for Transnet to conduct its other business during the period in question.

[5] Arising from these facts, Transnet claims to have suffered damages, which it is seeking to recover from the vessel by way of two separate actions *in rem*. On 13 January 2010 it accordingly caused the arrest of the vessel in terms of s 3(5) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the Act). In case number AC104/09 Transnet claims damages amounting to R34,8 million sustained by TPT, and in case number AC3/10 it claims that the damages sustained by TNPA amount to some R10,3 million. In both actions, Transnet's causes of action – save for the quantification of damages – are pleaded in

identical terms: first, Transnet relies on a contractual claim, alleging that the owner of the vessel breached a term of a contract between the parties that the vessel would be in a seaworthy and structurally sound condition upon her entry into port and maintained in such a condition while in port. In the alternative, Transnet relies on a delictual claim in which it is alleged that the owner of the vessel, either directly or vicariously through its employment of the crew of the vessel, negligently breached a legal duty that it had to ensure that the vessel was in a seaworthy and structurally sound condition when she entered port and while she remained there.

[6] After the actions *in rem* had been instituted and security for the release of the arrest had been provided, Transnet formed the view that its security for the *in rem* actions would be 'wholly insufficient' to satisfy its claims in full, regard being had to the value of the vessel and claims instituted against her by other creditors. Transnet accordingly decided to institute an action *in personam* against the respondent, in addition to and based on the exact same causes of action as the two pending actions *in rem.* As a precursor to the proposed action *in personam*, the present application for attachment was launched, which forms the subject of the present application.

[7] Copies of the attachment order were duly served by the sheriff, as directed by the order. Thereafter, on 27 March, the respondent's Protection & Indemnity Club furnished Transnet with security for its claim in the form of a letter of undertaking. The vessel was thereupon released from attachment and sailed from the port of Saldanha Bay on the same day, as mentioned earlier.

[8] In due course, the respondent delivered an answering affidavit in the present application, in which it opposes the confirmation of the rule *nisi* on several different grounds, not all of which need to be considered for purposes hereof.

Abuse of court process

[9] The respondent's main defence to the application was that the attachment is 'improper, an abuse of process [and] prohibited by *lis pendens*'. In amplification, the respondent contended that the contemplated action *in personam* is 'in effect a duplication' of the *in rem* actions that had already been commenced against the vessel. This is so, according to the respondent, because the actions *in rem* and *in personam* are based on the same underlying cause of action and arise from the same *in personam* liability. In fact, the alleged *in personam* liability of the owner of the vessel forms the very foundation to and underpins the actions *in rem* by virtue of the provisions of s 3(4)(b) of the Act.[2] Having elected to pursue its claims by way of proceedings *in rem*, so the respondent argued, the applicant cannot now seek to pursue the same claim in a separate action *in personam*. If this were to be allowed, so it was argued, it would in effect mean that there would be *three* separate actions pending in the same court between the same parties and founded upon the same causes of action, which would offend against the principle of *lis alibi pendens* and thus amount to an abuse of the court's process.

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[2] Section 3(4)(b), as far as is relevant, provides that '. . . a maritime claim may be enforced by an action *in rem* – . . . (b) if the owner of the property would be liable to the claimant in an action *in personam* in respect of the cause of action concerned'.

[10] Secondly, in view of the preceding arrests of the vessel by the applicant *in rem*, the applicant's claims were 'properly and sufficiently secured'. In these circumstances, the applicant is not entitled to bring the attachment application for the purpose 'of obtaining additional security over and above the value of the vessel in circumstances where the same claims were well secured by the arrest of the vessel and its bunkers in the *in rem* proceedings'.

[11] The applicant countered by relying on the provisions of the Act as well as the Admiralty rules, pointing out that the action *in rem* is in substance, and not only in form, a separate proceeding with a different defendant to an action *in personam*. Thus, the property arrested *in rem* must be named as the defendant[3] and the summons must be served on the property itself.[4] Proceedings *in personam*, on the other hand, carry with them important advantages. In particular, the judgment is granted against the owner of the property, not the *res*, and the judgment is not limited to the value of the *res*. Thus, in an action *in personam* execution can be levied against any property belonging to the owner and is not limited to the property arrested. The corollary is that, if a claimant in an action *in rem* were not to obtain satisfaction from the proceeds of the *res*, it would be entitled to sue the owner *in personam* for the balance.[5] It follows further, according to the applicant, that *lis alibi pendens* does not arise because the *in rem* and *in personam* proceedings are entirely distinct. In these circumstances, so the applicant argued, there is nothing precluding

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[3] Admiralty rule 2(4).
[4] Admiralty rule 6(2) and (3).
[5] *Bouygues Offshore & another v Owner of the Mt* Tigr *& another* 1995 (4) SA 49 (C) at 67H; Gys Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa* (2006) p 53.

it from proceeding simultaneously both by way of an action *in personam* and an action *in rem* – even though the underlying causes of action may be the same. Counsel referred in this regard to s 3(1) of the Act which expressly states that, subject to the provisions of the Act, 'any maritime claim may be enforced by an action *in personam*'. Moreover, s 3(4) permits a claim to be enforced by an action *in rem* '(w)ithout prejudice to any other remedy that may be available to the claimant. . . '. These provisions, according to the applicant, entitle a claimant to bring an action simultaneously *in rem* and *in personam* in the same or separate proceedings.[6] Reliance is placed in this regard on the provisions of Admiralty rule 22(5),[7] and Form 1 of the First Schedule to the rules.

[12] These arguments and counter-arguments raise fundamental questions as to the nature of the action *in rem,* the origin of which, according to one of the authors, 'appears to be shrouded in mystery'.[8] As was pointed out in *The Lady Rose*,[9] the question whether the true nature of the action *in rem* is an action lying against a thing or against a person or persons having an interest in the thing has been 'the subject of much debate.' This debate has continued unabated in recent years in textbooks

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[6] Hofmeyr *op cit* pp 48-49 and p 55 n 52. See also John Hare *Shipping Law & Admiralty Jurisdiction in South Africa* (2nd ed, 2009) p 92.

[7] 'The title of the proceedings shall consist of a heading indicating the nature of the document, the name of the division of the Supreme Court of South Africa concerned, the number assigned thereto by the registrar, the name of the ship and the names of the parties and, if the proceedings are or are in connection with any action, stating whether the action is an action *in rem* or *in personam* or *in rem* and *in personam*.' (Emphasis added.)

[8] Wiswall *The Development of Admiralty Jurisdiction and Practice since 1800* 165–6, quoted by Hofmeyr *op cit* p 47.

[9] *SA Boatyards CC v The* Lady Rose 1991 (3) SA 711 (C) at 715I per Scott J (with Kühn J concurring).

on maritime law in this country.[10] Wallis, in his doctoral thesis,[11] also dealt with the topic in considerable detail.

[13] It would be supererogatory for me to attempt to add to the accumulated learning on the subject. In the view that I take of the matter, it is in any event unnecessary for purposes of this judgment to make any firm findings regarding the true nature of the action *in rem* in modern South African law. In many of the foreign jurisdictions that are of significance to our maritime law – eg England, Australia, New Zealand, Singapore – it is recognised that in actions *in rem*, once appearance has been entered (if not earlier), the owner is in substance the defendant.[12] In our law, even though the separate identity of the thing is still strongly emphasised, there is a growing recognition that in reality the action *in rem* has a 'curious hybrid nature'.[13] Thus, where an action *in rem* is instituted based on the liability *in personam* of the owner, 'the action cannot be regarded as simply an action against a *res* without reference to the owner or person having an interest therein'.[14] This is particularly so where, as in the present case, the action is dependent upon the existence of a claim *in personam* against the owner. The conclusion is inevitable, as pointed out by Hofmeyr,[15] that once the owner has intervened 'it

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[10] See eg Hofmeyr *op cit* pp 47–89; Hare *op cit* pp 33–35, 80–103; H Staniland in 25(2) *LawSA* (1st reissue, 2006) *sv Shipping* paras 166–172.
[11] M J D Wallis *The Associated Ship and South African Admiralty Jurisdiction*, unpublished PhD thesis, UKZN (2010), Chapters 11 and 12, pp 431–511.
[12] Wallis, *op cit*, 446–447.
[13] Jackson *Enforcement of Maritime Claims* p 85, quoted with approval in *The Lady Rose*, *supra*, at 716B.
[14] *The Lady Rose, supra,* at 716B–C.
[15] *Op cit* p 54.

would be artificial not to treat the owner as a party, at least for certain purposes'.[16]

[14] As pointed out above, it is apparent that the damages to be claimed by the applicant in the proposed action *in personam* are the very same damages being claimed in the pending actions *in rem*. Not only do the various actions thus arise out of the same facts and give rise to the same causes of action, but the effective defendant in each – and the party potentially liable to pay – is the owner of the vessel.

[15] There are powerful policy considerations militating against a multiplicity of actions.[17] Wallis[18] suggests that the problem of a multiplicity of actions between the same parties 'could presumably be circumvented by the expedient of both arresting the vessel *in rem* and attaching it *ad fundandam et confirmandam jurisdictionem* at the same time so that the action could proceed as a hybrid action, both *in rem* and *in personam* at the same time'. However, as pointed out by the learned author, 'that seems to be an unnecessary and utterly wasteful exercise in litigation gymnastics, when the whole basis for the litigation is that the owner is personally liable and the owner has resisted that conclusion and lost'.[19]

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[16] See also Wallis, *op cit*, p 488, who states that 'to ignore an owner which is defending proceedings *in rem* is impractical and unrealistic'.
[17] See eg *Symington & others v Pretoria-Oos Privaat Hospitaal Bedryfs (Pty) Ltd* 2005 (5) SA 550 (SCA) para 26.
[18] *Op cit* p 480–481.
[19] *Id.*

[16] I respectfully agree with these sentiments. The present situation is an *a fortiori* case: if it would be a 'wasteful exercise' to pursue an action *in rem* as well as *in personam* at the same time in the *same* action, one may well ask rhetorically how much more wasteful it would be to pursue the same claim concurrently in *three* separate actions?

[17] But even if the applicant were to be permitted to prosecute its separate actions based on the same cause of action concurrently, it does not follow that it should be allowed to attach the ship (or the right, title and interest in it, as here) *ad confirmandam jurisdictionem* where that same ship has already been arrested in the pending actions *in rem*. I have not been referred to any authority sanctioning such a course of conduct and I am aware of none. However, the provisions of s 3(8) of the Act are not without significance in the present context. They read as follows:

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

[18] The situation in this case is that the applicant has already arrested the vessel and the respondent has given security therefor in respect of the applicant's maritime claim for damages. Sub-section 3(8) makes it clear that the applicant is not permitted, in these circumstances, to obtain a further arrest of the vessel. Can it, however, obtain an attachment as a precursor to its maritime claim *in personam*? Hare appears to recognise that such a course would not be permissible where he says:

'If the "belt and braces" approach of bringing both actions together is used, however, clearly only one lodgement of security would be required and this should be at the higher limit, ie the full value of the claim.'[20]

[19] To the same effect is the *dictum* by Shearer J in *West of England Ship Owners Mutual Insurance Association (Luxemborg) v MV* Rose,[21] where he said:

'It seems to me that it is clear that there should not be more than one attachment in respect of the same maritime claim which would result in an arrest and the provision of extra security.'

[20] Hare points out, further, that '[t]he decision of whether to proceed by way of an arrest with an action *in rem* or by an attachment with an action *in personam* is often a difficult one'.[22] In this case, the applicant has made its election – not just once, but twice – to proceed *in rem* and to arrest the vessel. In the light of the foregoing analysis, I am driven to the conclusion that the contemplated action *in personam* would seek to enforce the same maritime claim and be based on the same cause of action as the actions *in rem*, in respect of which the applicant has already secured an arrest of the vessel. In the circumstances, it would, in my view, amount to an abuse of the process to permit the applicant to obtain an attachment order to confirm jurisdiction.

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[20] *Op cit* p 92. Wallis, *op cit* p 436, points out that the roots of the attachment *ad fundandam et confirmandam jurisdictionem* 'are essentially the same as those of the action *in rem*'
[21] Shipping Cases of SA (SCOSA) B47 (D) 8 May 1996 at B48. See also LawSA, *op cit*, para 169.
[22] *Op cit* p 91.

Consent or submission to jurisdiction

[21] Even if I were to err in coming to the aforesaid conclusion, there is, in my view, a further reason why the attachment should be set aside. It has been submitted that prior to the attachment the respondent had consented or submitted to the jurisdiction of this court, as contemplated by s 3(2)(c) of the Act.[23] If this is indeed so, then it would follow that the respondent was already amenable to this court's jurisdiction when the attachment order was issued, with the result that the attachment order issued in these proceedings was neither necessary nor permissible.[24]

[22] It is clear from the authorities that consent or submission to jurisdiction (*prorogatio fori* or prorogation of jurisdiction) is a wide concept, which does not have to take any particular form. It does not have to be in writing and it can be express or implied. Whilst submission to jurisdiction can be a bilateral act, such as a formal agreement to submit a particular dispute between the parties to a particular forum ('submission by consent'), it can also be unilateral (termed 'submission by conduct').[25] What counts is an objective assessment of the conduct of the respondent (or defendant) in order to assess whether it constitutes a submission. The test is whether the conduct of the party is inconsistent with an intention to challenge or not to accept the jurisdiction of the court. In the final

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[23] Sec 3(2) provides, as far as relevant, that an action *in personam* may only be instituted 'against a person – (a) . . . ; (b) whose property within the court's area of jurisdiction has been attached by the plaintiff or applicant, to found or confirm jurisdiction; (c) who has consented or submitted to the jurisdiction of the court'.

[24] *Jamieson v Sabingo* 2002 (4) SA 49 (SCA) paras 24–26; *Naylor & another v Jansen* 2006 (3) SA 546 (SCA) para 27; *Tsung v IDC of SA Ltd* 2006 (4) SA 177 (SCA) para 6.

[25] Forsyth *Private International Law* (4th ed, 2003) p 203. An argument that unilateral submission to jurisdiction was not possible was expressly rejected by the SCA in *Jamieson v Sabingo, supra,* paras 15–27. See also *Mediterranean Shipping Co v Speedwell Shipping Co Ltd & another* 1986 (4) SA 329 (D) at 333E–G, quoted with approval in *Purser v Sales* 2001 (3) SA 445 (SCA) para 13.

analysis, the question whether or not a defendant (or respondent) has submitted to the jurisdiction depends on whether or not the cumulative effect of the proved facts establishes submission on a balance of probabilities.[26]

[23] There was no dispute between the parties regarding these legal principles. What was hotly contested, however, was the application of these principles to the facts of this case. In this regard, the respondent relied primarily on the terms of a letter of undertaking ('the LOU') issued on behalf of the respondent by the American Steamship Owners Mutual Protection and Indemnity Association Inc ('the American Club') during March 2010.

[24] The background to the furnishing of the LOU is important. It arose from an order granted on 22 January 2010 by Davis J in this court, exercising its admiralty jurisdiction, in a matter between *Anyang Steel International Trading Co Limited* and the present respondent, together with nine other respondents.[27] Transnet was cited as the sixth respondent in that case. In terms of the order, the respondent together with its agents and the crew of the vessel were interdicted from removing the vessel from alongside at the iron ore berth in the port of Saldanha Bay save in accordance with any lawful directions from the relevant authorities, including Transnet. Certain directions were also issued relating to the transhipment of the cargo of iron ore from the vessel. Paragraph 11 of the order provides as follows:

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[26] *Hay Management Consultants (Pty) Ltd v P3 Management Consultants (Pty) Ltd* 2005 (2) SA 522 (SCA) para 13.
[27] Case No AC107/10.

'Nothing contained in this order should be construed so as to derogate from the rights of any party to these proceedings to advance any claim against any one or more of the other parties, arising from or related to the continued and past presence of the vessel at the berth and/or within the port limits, including but not limited to any right to obtain and/or apply to increase any security already obtained for a claim advanced or to be advanced against any party and/or any right to arrest and/or attach any property of any such party/ies.'

[25] Pursuant to this order and before the commencement of transhipment of the cargo, Transnet demanded security from the respondent for possible costs of wreck removal and oil pollution clean-up (individually and collectively referred to in the eventual LOU as 'the Claims'). This demand gave rise to protracted negotiations between the attorneys for the respondent, Shepstone & Wylie, and the attorneys representing Transnet in the *Anyang* matter, Webber Wentzel. The wording of the proposed LOU underwent numerous changes, but the final version was eventually agreed on 9 March 2010. Clause 4 thereof reads as follows:

'We [ie the American Club] hereby appoint Shepstone & Wylie attorneys [at their Cape Town offices] to accept service of: Any demand under this undertaking; any legal proceedings commenced in respect of this undertaking; and any legal proceedings issued on your behalf in connection with the Claims, and we hereby confirm that we have irrevocable instructions and authority from the vessel owner to do so, and further to agree that *any claim of each party against the other*, including the Claims, and any and all disputes between the parties arising from the Claims, and/or this undertaking shall be exclusively determined by the Court.'[28] (Emphasis added.)

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[28] 'The Court' is defined in clause 2 as 'the High Court of South Africa, Western Cape High Court, Cape Town in the exercise of its Admiralty Jurisdiction'.

[26] These provisions are relied on by the respondent as constituting an express submission and consent to the jurisdiction of this court.

Applicant's argument

[27] The applicant disputed the validity of the purported submission to jurisdiction. Counsel argued, firstly, that the LOU was intended to deal solely with potential wreck removal, pollution and related issues, and not with the applicant's *in personam* damages claims. Interpreting the above provisions in the context of the LOU as a whole and within the factual matrix in which the parties operated,[29] so it was argued, the respondent did not in terms thereof submit to the jurisdiction of the court to adjudicate the applicant's *in personam* damages claims.

[28] In support of this argument, counsel also referred to what passed between the parties' representatives on the subject of the LOU. According to Mr Fitzmaurice, who negotiated the terms of the LOU on behalf of Transnet, the LOU was never intended to relate to anything other than the wreck and pollution claims referred to therein, or claims arising from wreck and pollution claims. In an e-mail message of 16 February 2010, Mr Fitzmaurice impressed on Mr Greiner of Shepstone & Wylie that the pollution LOU would *not* pertain to the 'recovery actions', which were being handled by Transnet's attorneys of record herein, Bowman Gilfillan. He accordingly stated that the reference in the earlier draft in question to 'any and all disputes between the parties arising from the incident is therefore too wide'.

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[29] See *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 (SCA) para 13 and the cases referred to therein.

[29] An alternative argument advanced on behalf of the applicant was that, if the court should conclude that the wording of clause 4 of the LOU did constitute a submission to the jurisdiction of the court to hear the *in personam* claims, then the LOU does not correctly reflect the intention of the parties and falls to be rectified by the replacement of the last portion of paragraph 4 thereof with the following words:

'… and further to agree that all possible wreck removal and/or pollution abatement or pollution clean-up costs of each party against the other, including the Claims, and any and all disputes between the parties arising from the Claims, and/or this undertaking shall be exclusively determined by the Court.'

If the LOU is rectified as set out above, so the argument went, then it is clear that it does not constitute a submission to jurisdiction in relation to the *in personam* claims, being precisely what the parties intended at the time.

[30] It was further pointed out that the final signed LOU was never actually furnished to the applicant, with the result that no submission to the jurisdiction of the court pursuant to the LOU could have taken place in terms thereof. Moreover, in terms of clause 3 of the LOU, the undertaking would be of force and have effect only so long as the vessel remained at her present position alongside the berth:

'Should the vessel for whatever reason be moved from her present position this undertaking shall lapse and shall be null and void, save in circumstances where the vessel is required to be moved off the berth in an emergency.'

As the vessel had eventually safely departed from the terminal without being wrecked or causing any pollution, the LOU (if it ever came into existence) lapsed, according to the applicant.

Discussion

[31] In my view, the applicant's arguments are based on an overly narrow interpretation of the LOU. The answer to a large part of the argument is that the LOU, read as a whole, deals with two aspects: first, it furnishes security for 'the Claims', ie the potential pollution and salvage claims (if any). At the same time, however, it also constitutes an express submission to the jurisdiction of this court on the part of the respondent. Whereas counsel is correct insofar as the undertaking *stricto sensu* deals only with 'the Claims', the submission to the jurisdiction – as expressed in clause 4 of the LOU – is significantly wider in ambit: it encompasses 'any claim of each party against the other, *including the Claims*. . . '. Clause 4 thus distinguishes between 'the Claims' (ie the pollution claims), on the one hand, and other claims that the parties may have against one another, which would include the proposed *in personam* claim, on the other hand. Notwithstanding this distinction between different categories of claims, the submission to jurisdiction contained in clause 4 unambiguously relates to both categories. In this regard, the evidence of Mr Fitzmaurice[30] actually fortifies the respondent's case. As mentioned above, Mr Fitzmaurice complained at one stage that the reference in an earlier draft to 'any and all disputes between the parties arising from the incident' was too wide. However,

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[30] Para [28] above.

the final version was even wider: it now refers to 'any claim of each party against the other, including the Claims'.

[32] A further difficulty with the applicant's argument is that it tends to overlook the fact that submission to jurisdiction may be unilateral; the consent of the applicant is not required, nor can the applicant object to the submission thereto or refuse to accept it.[31] In my view, this is what happened in this instance: whereas the terms of the LOU insofar as it related to the undertaking as such were obviously the subject of extensive negotiations, for which *consensus* was required, the submission by the respondent contained in clause 4 was unilateral and did not require the applicant's consent. A defence of rectification therefore does not find application; it is the intention of the respondent alone which is decisive. In this regard it may be accepted, in my view, that the existence of other claims between the parties would have been clearly present to the mind of the respondent when furnishing the undertaking, given the fact that two actions *in rem* that had already been instituted by the applicant by the time the undertaking was finalised. Moreover, both actions depend for their validity on the *in personam* liability of the respondent vis-à-vis the applicant.

[33] The argument based on the fact that the signed LOU was never physically delivered to the applicant is neither here nor there. Delivery of the instrument containing the submission to jurisdiction is not a prerequisite for its validity.

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[31] See the authorities referred to in n 20 above.

[34] As for the argument that the letter of undertaking (in clause 3 thereof) contained within itself the seed of its own destruction,[32] the short answer is that, once a litigant has submitted to the jurisdiction of the court, its submission remains in place and cannot later be withdrawn.[33]

[35] The applicant's argument can be tested by postulating the boot on the other foot in the proposed action *in personam*: suppose that in that case the respondent (defendant) were to raise a special plea that the court does not have jurisdiction to hear the matter. Surely a replication relying on the submission to jurisdiction contained in clause 4 of the LOU is bound to be upheld. In fact, I would venture to suggest that such a special plea could justifiably be criticised by the court as disingenuous.

[36] The applicant has been unable to point to any conduct on the part of the respondent which is inconsistent with an intention to submit to the jurisdiction of this court. Even if the contents of clause 4 may be regarded as ambiguous, there is subsequent conduct on the part of the respondent tending to support the respondent's construction.[34] In this regard, the proof of the pudding lies in the respondent's pleas to the actions *in rem* (coincidentally delivered approximately half-an-hour after service of the attachment order herein), in which the respondent does not challenge the jurisdiction of this court.

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[32] Para [30] above.
[33] Voet *Pandectas* 2 1 26; *Centner NO v Griffin NO* 1960 (4) SA 798 (W) at 799D–F; Forsyth *op cit* p 205 n 381.
[34] Cf R H Christie *The Law of Contract in South Africa* 5ed (2006) p 218.

[37] I conclude therefore that the respondent had already consented or submitted to the jurisdiction of this court in respect of Transnet's proposed action *in personam* before the attachment order had been executed.

[38] For the reasons stated above, it follows that the attachment falls to be set aside. In the light of this conclusion, it is not necessary to consider any of the other defences raised on behalf of the respondent.

Order

[39] In the result, the following order is issued:

The attachment order granted by this court on 23 March 2010 under the above case number is set aside with costs, including the costs of two counsel.

B M GRIESEL
Judge of the High Court

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)
(exercising its Admiralty Jurisdiction in terms of Act 105 of 1983)

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ADV. FOR APPLICANT: Adv R W F MacWilliam, SC et Adv D J Cooke

INSTRUCTED BY: Bowman Gilfillan (Craig Cunningham)

ADV. FOR FIRST RESPONDENT: Adv A M Stewart, SC et Adv M Steenkamp

INSTRUCTED BY: Shepstone & Wylie (Anneke Viljoen)