IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

CASE NO: AC11/2015

Name of ship: **MV "Asturcon"**

In the matter between:

THE MOTOR VESSEL "ASTURCON"	First Applicant
STALLION FIVE SHIPPING COMPANY S.A.	Second Applicant
ASSURANCEFORENINGEN GARD – GJENSIDIG	Third Applicant

And

AFRILINE DENIZCILIK VEG EMI KIRALAMA LTD	First Respondent
NORTON ROSE FULBRIGHT SOUTH AFRICA INC.	Second Respondent

JUDGMENT DELIVERED ON THIS 2nd DAY OF SEPTEMBER 2015

VAN ROOYEN, AJ

[1] The second applicant ("Stallion") is the registered owner of MV Asturcon ("the vessel").

[2] On 2 March 2015 the first respondent ("Afriline"), pursuant to the provisions of the Admiralty Jurisdiction Regulation Act, 105 of 1983, ("the Act"), instituted an admiralty action *in rem* in this court against the vessel for payment of the sum of USD251,920 and the vessel was arrested pursuant to a warrant of arrest issued by the Registrar in terms of Admiralty Rule 4(2)(a)[1], without prior notice to the applicants.

[3] On 10 March 2015, the third applicant, in order to secure the release of the vessel, furnished security by way of a letter of undertaking ("the LOU") on behalf of the vessel and Stallion.

[4] On 27 March 2015, Stallion launched an application for security for costs, the setting aside of the arrest of the vessel and the return of the LOU to Stallion for cancellation.

[5] On 19 May 2015 this court ordered Afriline to furnish security, in an amount to be determined by the taxing master of this court, to Stallion. On 20 May 2015 the taxing master directed Afriline to furnish security to Stallion in the amount of R650,000 by way of a bank guarantee.

[6] On 3 June 2015, Stallion's application for the setting aside of the arrest of the vessel and the return of the LOU was argued. By agreement, judgment was pended and this court ordered Afriline to furnish the security by 12h00 on 9 June 2015, failing which Stallion, without further notice to Afriline, would be

[1] Published in GN R571 of 18 April 1997

entitled to seek the setting aside of the arrest of the vessel and the return of the LOU.

[7] Afriline failed to furnish security by 12h00 on 9 June 2015 and after 12h00 that day, its legal representatives sought from this court an extension of the period within which to furnish security. It was refused and this court ordered the setting aside of the arrest of the vessel and the return of the LOU to Stallion within a day of the order.

[8] Afriline sought leave to appeal but it was refused by this court. Subsequently, leave to appeal was sought from the Supreme Court of Appeal and during oral argument I was informed that leave had been granted.

[9] The return of the LOU is the subject matter of this application. Stallion has sought the return of the LOU but Afriline has asserted that, pending the application for leave to appeal (and the appeal), the order granted on 9 June 2015 is suspended.

Urgency

[10] This application was launched as a matter of urgency on 1 July 2015 with the stated intention to be heard on 21 July 2015. By 21 July 2015 Afriline's answering affidavit and the applicants' replying affidavit had been filed and it was ordered that the matter be postponed for hearing in the Fourth Division (a division for the hearing of matters in due course) of this court on 31 August 2015.

[11] The grounds relied on by the applicants for bringing this application as a matter of urgency, are that Afriline is in contempt of the order granted on 9 June 2015 and that the security constituted by the LOU costs Stallion in the region of USD2,000 per month to maintain. It was submitted in the founding affidavit that this application should be treated as one of semi-urgency.

[12] According to Afriline, the matter is not urgent at all and the form, manner and time periods adopted by the applicants were inappropriate. Afriline argues that, by "*jumping the queue*" and having this application heard urgently and before the appeal is determined, the applicants have procured for themselves an unfair and highly prejudicial procedural advantage. Afriline submits that the determination of this application should stand over until the appeal has been determined.

[13] An arrest *in rem* on an *ex parte* basis is an invasive process and, understandably, an affected party is permitted to approach a court on an urgent basis to apply for the setting aside of an arrest. By parity of reason, an affected party should be permitted to approach a court on an urgent basis for the setting aside of a deemed arrest and the security that has been required to create the deemed arrest. Logic dictates that such urgency should be extended to the determination of the effect of a pending appeal on a letter of undertaking which has been given to create a deemed arrest.

[14] Moreover, the maintenance costs of the LOU are substantial and that consideration in itself constitutes semi-urgency [2]. If the applicants are correct that the appeal does not suspend the order granted on 9 June 2015 it will be iniquitous to expect of Stallion to continue maintaining the LOU at a substantial cost.

[15] Fairness therefore dictates that the effect of the 9 June 2015 order, pending the appeal, be determined expeditiously.

[16] In any event, Afriline had sufficient time to prepare an answering affidavit and this court was not inconvenienced because this application was not even postponed to the semi-urgent roll but to the Fourth Division.

[17] In these circumstances the applicants' non-compliance with the Uniform Rules is condoned.

Merits

[18] Section 18(1) of the Superior Courts Act, 10 of 2013, as well as Uniform Rule 49(11) provide that "*the operation and execution of a decision*" which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal. [3]

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[2] See *Twentieth Century Fox Film Corporation v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W) at 586G, regarding the principle that the urgency of commercial interests may justify the invocation of Rule 6(12)(a).

[3] In terms of s 18(1), read with s 18(3), a court may, under exceptional circumstances, order otherwise.

[19] For suspension contemplated in s 18(1) of the Superior Courts Act and Uniform Rule 49(11) to come into effect, there must be a decision susceptible to "*execution*".

[20] In *S.A.B Lines (Pty) Ltd v Cape Tex Engineering Works (Pty) Ltd* 1968 (2) SA 535 (C) an applicant obtained a rule *nisi* calling upon the respondent to show cause why an interdict against it, to prevent it from removing a vessel from the Cape Town docks pending payment of an amount due, should not be granted. In terms of the order, the rule operated as an interim interdict. The Court subsequently refused the application and discharged the rule *nisi*. The Court was called upon to consider the execution of the order pending the appeal and made the following findings:

"*The order of the Court was one refusing the application, and I have difficulty in seeing how a negative order of that nature could be carried into execution.*" [4]

And [5]:

"*In my view such a provision for an interim interdict is always intended to operate pending the decision of the application on the return day of the rule nisi and I read the provision for an interdict in this case in that light and with that intention.*"

[21] It needs to be considered whether the order granted on 9 June 2015 can be described as "*one refusing the application*" which is a "*negative order*" and which cannot be carried into execution. If it can be categorised as such, there

[4] At 536G
[5] At 537E-F

is no "*operation and execution of a decision*", contemplated in s 18(1) of the Superior Courts Act and Uniform Rule 49(11), that can be considered.

[22] Whether the 9 June 2015 order is a "*negative order*" can be determined with reference to the way in which courts have approached applications for setting aside orders for the arrest of vessels, obtained *ex parte*.

[23] In *Cargo Laden on Board the MV Thalassini AVGI v MV Dimitris* 1989 (3) SA 820 (A) at 834D-F the approach to an application for the setting aside of an order for the arrest of a vessel, obtained *ex parte*, was explained as follows:

"*The incidence of the onus in such a situation is of importance in this case. In* [Bradbury Gretorex Co (Colonial) Ltd v Standard Trading Co (Pty) Ltd 1953 (3) SA 529 (W)] *… it was pointed out by Steyn J at 531A-D that an applicant cannot by obtaining ex parte an order in his favour secure a more advantageous position than he would have been in if the other party had had an opportunity of putting counter-allegations before the Court; consequently, if the other party applies for the setting aside of the order, the original applicant retains the onus of satisfying the Court that he was entitled to it. That approach was applied, correctly in our view, in the context of applications for setting aside the arrest of a ship procured in terms of s 3(4) and (5) of the* [Admiralty Jurisdiction Regulation] *Act in Transgroup Shipping SA (Pty) Ltd v Owners of MV Kyoju Maru 1984 (4) SA 210 (D) at 214I and Transol Bunker BV v MV Andrico Unity and Others 1987 (3) SA 794 (C) at 799D, and it must apply equally to an order for arrest obtained ex parte in terms of s 5(3)(a).*"

[24] In *The MV Snow Delta: Discount Tonnage Ltd v Serva Ship Ltd* 1996 (4) SA 1234 (C), Selikowitz J, relying on *inter alia The Dimitris*, stated the following [6]:

"*I have had regard to Admiralty Rule 4 and find that it is to be interpreted in the light of the law relating to the approach when an order of attachment is obtained ex parte and then reconsidered when opposed either on the return day of the accompanying rule nisi or where the respondent actively seeks to set aside the order. Our law treats the matter as a reconsideration of the application. The original applicant bears the onus in both the stated circumstances.*"

And [7], with reference to the *S.A.B Lines* matter:

"*The effect of the setting aside of the attachment … was analogous to the attachment having been unsuccessfully sought … for the first time. The grant of leave to appeal does not, in my view, revive the order which had earlier been granted ex parte.*"

[25] The Supreme Court of Appeal accepted Selikowitz J's reasoning [8] and stated the following [9]:

"*… dismissal of a claim or application is not suspended pending an appeal, simply because there is nothing that can operate or upon which execution can be levied. Where an interim order is not confirmed, irrespective of the wording used, the application is effectively dismissed and there is likewise nothing that can be*

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6 At 1234J – 1235B
7 At 1235B-C
8 *MV Snow Delta: Serva Ship Ltd v Discount Tonnage Ltd* 2000 (4) SA 746 (SCA) at para [6]
9 At 752A-B

suspended. An interim order has no independent existence but is conditional upon confirmation by the same Court … in the same proceedings after having heard the other side …" [10]

[26] Afriline seeks to distinguish the situation in *casu* from *The Snow Delta* on the basis that, in *The Snow Delta*, the Court dealt with an application to attach property for purposes of founding an admiralty action in *personam* and in which a rule *nisi* had been granted which was not confirmed on its return day. Afriline contends that an admiralty *in rem* arrest by means of which an action *in rem* is instituted, is neither temporary nor interlocutory and the fact that it may be granted by the Registrar and without notice, or the fact that it may subsequently be challenged in further proceedings does not transform its fundamental nature. Thus, Afriline submits, when an *in rem* arrest is set aside, it cannot be argued that, when an appeal is lodged, there is nothing that can be revived. There is an existing and extant arrest conferring procedural and substantive rights on the party in whose favour it has been made and which underpins an existing action in the very Court where the arrest has been obtained.

[27] However, it is clear from the aforequoted passage from Selikowitz J's judgment in *The Snow Delta* that he dealt with the way in which Admiralty Rule 4 (which provides for an arrest in an action *in rem)* must be interpreted in general. That includes the situation where, as in *casu*, a warrant is issued by the registrar without referring it to a judge.

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[10] See too *National Director of Public Prosecutions v Rautenbach* 2005 (4) SA 603 (SCA) at para [12]

[28] Hofmeyr [11] deals with the Supreme Court of Appeal's judgment in *The Snow Delta* and states the following:

"*The question which arises is whether similar considerations apply to an arrest in rem made pursuant to an order for arrest made by the registrar which is subsequently challenged and set aside by the court. While the registrar's order is not an adjunct to another order in the same way as an interim order of attachment, which is only intended to operate until the return of the rule nisi, it may be contended that it is implicit in the registrar's order that it is provisional in the sense that it was only intended to continue to operate unless and until challenged. On this basis, if the challenge succeeds, the case for arrest is effectively dismissed and there is no order having operation which can be suspended in terms of Uniform Rule 49(11). It is submitted that this approach is the correct one. Where the registrar's order is confirmed there is an order that can be suspended pending an appeal.*"

[29] Hare [12] presents an argument to the contrary but then concludes that:

"*On balance, however, the Supreme Court of Appeal's approach in The Snow Delta would probably prevail, even in the case of a simple Registrar's arrest, especially because of the very strong views expressed in the long line of cases in South Africa that where relief is obtained ex parte (such as a simple arrest order issued by the Registrar), the relief granted in that order is provisional – irrespective of the form in which it was cast.*"

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[11] *Admiralty Jurisdiction Law and Practice in South Africa*, 2nd ed, at 171 para X.41

[12] *Shipping Law & Admiralty Jurisdiction in South Africa*, 2nd ed at 88-89

[30] The provisions of s 3(6) and (7) of the Act are "*manifestly procedural in nature"* as was pointed out in *Transgroup Shipping SA v Mv Kyoju Maru Owners* [13] and:

"*… merely provide a remedy whereby an existing claim may be enforced leaving the merits of the claim unaffected. The subsections do not involve any interference with existing rights and obligations, in as much as they do not affect the nature or validity of the claim but merely provide a procedure for enforcing it …*" [14]

The onus remains on Afriline to justify the arrest of the vessel [15].

[31] In these circumstances I cannot see why, in the instance of an arrest *in rem* on an *ex parte* basis, a party should be allowed to "*secure a more advantageous position than he would have been in if the other party had had an opportunity of putting counter-allegations before the Court*" [16] and why the principle enunciated in *The Snow Delta* should not apply.

[32] As far as the arrest of the vessel is concerned, the order granted on 9 June 2015 should therefore be treated as analogous to the arrest of the vessel being "*unsuccessfully sought … for the first time*" [17] and the dismissal of an application for a warrant authorising such an arrest. Consequently, it is a "*negative order"* which cannot "*be carried into execution*" [18] and there is

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[13] *supra* at 213H
[14] At 214E
[15] *Transgroup* at 214I
[16] *MV Dimitris* at 834D
[17] Selikowitz J in *The Snow Delta*, *supra*
[18] *S.A.B Lines* at 536G

nothing to be suspended in terms of s 18(1) of the Superior Courts Act and Uniform Rule 49(11).

[33] Afriline further argues that the wording of the LOU operates to secure Afriline's claim against the vessel and costs, including the costs of the pending appeal. The return of the LOU can therefore not be ordered as it continues to act as security for proceedings (the appeal) which have not been determined.

[34] The LOU ought to be considered in the context [19] in which it was furnished. It served the purpose of securing the release of the vessel and to create a deemed arrest of the vessel, contemplated in s 3(10)(a)(i) of the Act. The LOU therefore owes its *raison d'être* to the arrest of the vessel.

[35] The effect of the setting aside of the arrest of the vessel is analogous to the arrest "*having been unsuccessfully sought*" [20]. It follows of necessity that, if the arrest is to be seen as having been unsuccessfully sought, the deemed arrest is terminated and the rationale for the LOU falls away.

[36] In these circumstances, it is untenable to argue that the LOU ought to be interpreted as an undertaking to secure the costs of the pending appeal even if the arrest of the vessel cannot be revived by the pending appeal. If it were not for the LOU, the vessel would have been released, courtesy of the 9 June

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[19] See the emphasis on context in the interpretation of a contract as dealt with in *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) at para [39]. See too Christie, *The Law of Contract in South Africa,* 6th ed at 221-227 regarding the importance of "wider context" which means that "context does not stop at the four corners of the written contract" (at 221) and the need for a purposive construction.

[20] Selikowitz J in *The Snow Delta*, *supra*

2015 order, despite the pending appeal. Why then should the LOU which took the place of the vessel to create a deemed arrest, stay in place?

[37] I was urged by counsel for the applicants to order Afriline to pay the applicants' attorney-and-client costs. However, I am not convinced that Afriline's opposition to this application is so unreasonable that it warrants a special order as to costs.

[38] It is therefore ordered that:

(a) The original letter of undertaking dated 5 March 2015 furnished to the first respondent by Gard AS (a copy of which is annexed to the applicants' founding affidavit, marked "JLD1") shall be delivered by the second respondent to the applicants' attorneys of record within 24 hours of this order.

(b) The first respondent shall pay the applicants' costs of this application.

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R F VAN ROOYEN, AJ