Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]

Case No: AC40/2016
AC41/2016

In the matter between:

MS MARE TRAVELLER SCHIFFAHRTS GMBH & CO KG **First Applicant**

MS MARE TRACER SCHIFFAHRTS GMBH & CO KG **Second Applicant**

and

THE MV "HANJIN ROME" **First Respondent**

AND THE OTHER ASSOCIATED SHIPS SET FORTH IN THE SCHEDULE ANNEXED HERETO MARKED "X" **Second Respondent**

JUDGMENT DATED: 29 SEPTEMBER 2017

LE GRANGE, J:

Introduction:

[1] The Applicants ("MTS") under case numbers AC40/2016 and AC41/2016 caused two writs of summons *in rem* to be issued on 2 September 2016 in which 72 vessels were cited as Defendants.

[2] In the present instance, the application only relates to 64 vessels ("Defendants".) According to the papers filed of the record certain of the

original Defendants have either been broken up or are about to be broken up. One of the original Defendants was also not cited in this application as it appears that the vessel was sold prior to the writs being issued. The MV "Hanjin Green" was also cited twice in writs of summons, and the duplication has since been rectified.

[3] In March 2017 the erstwhile owner Tebtale Marine Inc. ("Tebtale") of the 24th Defendant, the MV "Hanjin Cape Lambert" (renamed the MV "Mount Meru" now the MV "Songa Mountain"), launched certain applications in this Division seeking, *inter alia*, an order that the reference to the vessel as a defendant in the actions *in rem* be removed immediately. The applications by Tebtale were opposed by MTS.

[4] Judgment was delivered on 21 July 2017 in what is now commonly referred to as the Tebtale judgment. In that judgment, part of the relief granted by Burger AJ, was the following:

> *"The reference to the MV Mount Meru, formerly the MV Hanjin Cape Lambert, IMO no 9444039, in the summons in rem issued under case number AC40/2016 is deleted."*

[5] MTS has since launched an application for leave to appeal against the order and judgment of Burger AJ, such leave having been granted to the Supreme Court of Appeal.

Present Application:

[6] In the present instance, MTS seeks an extension of the one year period of validity of the writs of summons issued under case numbers AC40/2015 and AC41/2015, in terms of section 5(2)(dA) of the Admiralty Jurisdiction Regulation Act, 105 of 1983 as amended ("the Admiralty Act") read together

with Admiralty Rule 6(1)(a) of the Admiralty Rules[1], and that the period within which the writs of summons and warrants of arrest may be served be extended to 3 September 2018.

[7] The relevant provision of s 5(2)(dA) of the Admiralty Act provides as follows:

> *"5 Powers of court*
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> *(1) …*
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> *(2) A court may in the exercise of its admiralty jurisdiction-*
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> *…*
>
> *(dA) on application made before the expiry of any period contemplated in section 1 (2) (b) or 3 (10) (a) (ii), or any extension thereof, from time to time grant an extension of any such period;…"*

[8] Rule 6(1)(a) of the Admiralty Rules states:

> *"6. Service in rem*
>
> *(1)(a) No summons or warrant shall be served if more than one year has expired since the date when it was issued unless the court has, before the expiry of the period of one year, on application, granted leave for the summons or warrant to be served within such further period as the court may deem fit."*

[9] According to MTS, the application is necessitated by the provisions of section 1(2)(b)(iii) of the Admiralty Act and Admiralty Rule 6(1). The section provides that an action *in rem* commenced shall lapse and be of no force and effect if the process contemplated in paragraph 1(2)(a)(iii) is not served within 12 months of the date of issue thereof. The rule, as stated above,

[1] Rules Regulating the Conduct of the Admiralty Proceedings of the Several Provincial and Local Divisions of the Supreme Court of South Africa ("Admiralty Rules") published in GN R571 in Government Gazette 17926 of 18 April 1997 (as corrected by GN R655 in Government Gazette 17968 of 2 May 1997).

limits the service of a summons or warrant, unless a court on application has extended the period.

[10] The owners of six of the Defendants, namely the 24th, 32nd, 34th, 38th, 41st and 42nd Defendants are opposing the relief sought by MTS. This opposition is also applicable to the 8th and 9th Defendants who relates to the SM Lines. For ease of reference I will refer to them collectively as "the Defendants".

[11] The main grounds raised by the Defendants in opposing the relief sought are the following. Firstly, the Tebtale judgment should be regarded as binding authority, to the extent that where a writ has been issued against a vessel and that vessel is sold at arm's length pursuant to a legitimate sale transaction, following the issuance of the writ but prior to the actual arrest of the vessel, that vessel can no longer be arrested and falls to be deleted from such a writ. Secondly, the fact that MTS has obtained the necessary leave to appeal the said judgment or part thereof does not suspend the operation of that judgment. Thirdly, in respect of all of the vessels a legitimate and arm's length sale and transfer of ownership had occurred prior to any service of the writ. In this regard the following information regarding the Defendants are not in dispute namely, the 24th Defendant the MV "Hanjin Cape Lambert", is now named the MV "Songa Mountain" and is owned by Songa Mountain AS. The 32nd Defendant, the MV "Hanjin Buchanan", is now named the MV "Horizon II" and is owned by Hotdoc Enterprises Ltd. The 34th Defendant, the MV "Hanjin Esperance", is now named the MV "True Endurance" and is owned by Defender 6 Ltd. The 38th Defendant, the MV "Hanjin Paradip", is now named the MV "Peak Proteus" and is owned by Defender 14 Ltd. The 41st Defendant, the MV "Hanjin Newcastle", is now named the MV "True Navigator" and is owned by Constitution 2 Ltd. The 42nd Defendant, the MV "Hanjin Port Walcott", is now named the MV "True Windsor" and is owned by Constitution 1 Ltd.

[12] According to the papers filed of record, the 8th and 9th Defendants were sold with clean title pursuant to a judicial sale in Gibraltar and the Bahamas, respectively.

[13] MTS does not dispute that the owners of the Defendants opposing the relief sought, acquired the respective Defendants on a legitimate arm's length basis. Furthermore, the said Defendants are precluded from undertaking any business and or visiting South Africa even for operational purposes, as long as the threat by MTS to arrest the Defendants remains.

[14] MTS contented, amongst others, that consideration should be given to the possible prejudice it may suffer if such an extension will not be granted. Moreover, according to MTS, the ship watch facility operated by them indicated that none of the Defendants have called at a South African port since the writs of summons were issued as they trade past South Africa, but a reasonable prospect remain that one or more of the Defendants will call at a South African port, if not to work cargo, then at least to bunker, change crew, or procure parts, or for repairs.

[16] It was further contended by MTS that the judgment and order in the Tebtale matter is final in nature and that by reason of the common law and section 18(1) of the Superior Courts Act, 10 of 2013, the operation and execution of that decision is suspended pending the determination of the appeal itself.[2] To this end it was contended that there can be no prejudice to the Defendants should the period of validity of the writ of summons *in rem* and the period within which the writs of summons and warrants may be served be extended, as MTS has undertaken not to effect an arrest of the opposing Defendants pending the outcome of the appeal.

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[2] Prior to the commencement of this section the common law prevailed. This was encapsulated in Rule 49(11), since been repealed, which stated: *"Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of court has made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs."*

[17] It was further contended that if the writs of summons and warrants of arrest that may be served was not extended, it would cause irreparable prejudice to MTS as any appeal that it may be permitted to prosecute will in all probability be moot.

The extension of the period within which the writs of summons *in rem* may be served

[18] The provisions of section 5(2)(dA) and Admiralty Rule 6(1) clearly allows a court discretionary powers to order the extension of time for the service of a writ of summons and warrant of arrest.

[19] In my view, in matters of this nature regard must be had in each case to all relevant circumstances. Ordinarily a court may grant an extension of time for the service of a writ of summons and warrant of arrest that may be issued, unless there are circumstances by reason of which justice and equity demands a different outcome.

[20] In the present instance, the Defendants grounds of opposition are not without merit. Although the order issued in respect of the Tebtale judgment was confined to the 24th Defendant, the ultimate reasoning and finding by Burger AJ, that where a vessel is legitimately sold pursuant to an arm's length transaction prior to its physical arrest, it can no longer be arrested, as the commencement of proceedings for the purpose of enforcement of a claim arose only upon actual service of the writ of summons and not upon the mere issue of a protective writ, cannot be regarded as a clearly incorrect decision. In any event, there is no good reason in law to differ and to depart from the reasoning and finding of Burger AJ.

[21] In fact, the reasoning by Burger AJ in the Tebtale judgment is supported by two authors on Admiralty in South Africa, namely, Gys Hofmeyr[3] and Malcolm Wallis[4].

[22] The question now is whether under these circumstances it is just and equitable to grant an extension of the protective writs that had been issued but not yet served as the Tebtale judgment has the effect that the writs MTS now sought to be extended have no legal effect pursuant to a subsequent bona fide sale and prior to service thereof.

[23] In the present instance, it is not in dispute that the Defendants are precluded from undertaking any business in South Africa or even visiting South Africa for operational purposes, for as long as the threat by MTS to arrest the vessels remains (despite the undertaking not to effect an arrest of the Defendants pending the outcome of the appeal). Indeed, should any of the vessels be forced to call at a South African port due to emergency operational requirements, it suffers the risk of arrest.

[24] The complaint by the Defendants that in the present economically depressed shipping market, this is an unreasonable barrier to trade and will result in serious financial impediment and loss particularily to South Africa, cannot be ignored. Moreover, it appears on the papers filed of record that

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[3] Admiralty Jurisdiction Law and Practice in South Africa, 2006.
[4] The Associated Ship and South African Admiralty Jurisdiction, 2010.

where vessels are likely to trade to South Africa, owners and operators have been warned of the potential for arrest. As a result, the Defendants avoid trade to South Africa whilst the protective writs are operative.

[25] In considering the prejudice that the parties may suffer, the Tebtale judgment is rather clear in its effect. The issue now is whether as a result of the pending appeal to the Supreme Court of Appeal, the Tebtale judgment has been rendered inoperative and deprived of its effect.

[26] In terms of the common law and section 18(1) of the Superior Courts Act, the operation and execution of a decision is suspended pending the determination of the appeal itself. These proceedings are also applicable to Admirality Rule 24.

[27] On this issue, counsel for the Defendants, Mr. M J Fitzgerald, SC relied on the matter of MV Snow Delta: Serva Ship Ltd v Discount Tonnage Ltd[5] for the proposition that a litigant, who on an *ex parte* basis obtains an order from the Registrar and issues a protective writ without notice to a targeted vessel is by its very nature provisional and interim and cannot be in a better position when the order is reconsidered by the Court. Accordingly, it was argued that a dismissal of a claim or application is not suspended pending an appeal as there is nothing that can operate or upon which execution can be levied[6]. It was further contended that the undertaking by MTS not to arrest any of the

5 2000 (4) SA 746 (SCA).
6 ibid at para [6].

Defendants pending the appeal is cold comfort, as such an undertaking cannot detract from the invalidity of the protective writ already issued.

[28] Counsel for MTS, Mr. M Wragge contended that the present matter is distinguishable from the Snow Delta matter, in that the status of the actions *in rem* commenced by MTS pursuant to the difference is not equivalent to that of an interim order conditional upon confirmation by the same court, as the issue of a writ of summons is a procedural step taken to bring the action before the court. Furthermore, it was argued the writs of summons issued in this case were all valid and it was only as a result of the sale which occurred sometime there after, that it can no longer be enforced, as held in the Tebtale judgment.

[29] In Snow Delta[7], the Supreme Court of Appeal was concerned with an interim order for the attachment of property to found jurisdiction. Having considered the issue, the Court held that:

> " *dismissal of the 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 suspended. An interim order has no independent existence but is*

[7] ibid

conditional upon confirmation by the same Court… in the same proceedings after having heard the other side…"[8]

[30] The ultimate question now is whether, in the present instance, similar considerations apply to an arrest *in rem* pursuant to an order for arrest made by the Registrar, which is subsequently challenged and set aside by the Court.

[31] The author Gys Hofmeyr *supra*[9] expressed the view that '[w]hilst 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 day 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 that basis, if the challenge succeeds, the case for arrest is effectively dismissed and there is no order having operation which can be suspended..'.

[32] This approach by Hofmeyr is in my view eminently sound and convincing and is there no good reason not to accept it. It speaks for itself that where the Registrar's order is confirmed there would be an order that can be suspended pending an appeal.

[33] Taking into account the prejudice that MTS may suffer and the fact that they have had approximately 12 months to seek the arrest of the

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8 at 752 A-B; see also NDPP v Rautenbach 2005 (4) SA 603 at para [12].
9 Ibid at 171.

Defendants, justice and equity in these circumstances dictate that it would not be commercially sound and in the interest of justice to extend the writ of summons and order for arrest of the Defendants. Moreover, the remarks made by Harms AJ in Snow Delta, is to an extent pertinent in this instance where the following was said:[10] "…*it has often been said that our Courts should not easily assume jurisdiction in favour of peregrini against* peregrini *in relation to litigation which has no connection to this country. Such an assumption of jurisdiction may prevent potential peregrini defendants from trading here and put them to unnecessary inconvenience and expense in requiring them to litigate here. There is also no reason why our limited public and judicial resources should be expended in respect of disputes which are unconnected to and between persons who have no relationship with our country."* (Although the issue related to an attachment of a vessel to confirm jurisdiction, an equally important consideration was the fact that *peregrine* Defendants are mostly prevented from trading to South Africa.)

[34] For these reasons the application in respect of the Defendants, namely the 8th, 9th, 24th, 32nd, 34th, 38th, 41st and 42nd falls to be dismissed with costs.

[35] In the result the following orders is made:

1. The application in respect of the Defendants, namely the 8th, 9th, 24th, 32nd, 34th, 38th, 41st and 42nd under case numbers AC40/2016 and AC41/2016, where the period in which writs of summons in rem and

10 ibid para [14].

warrant of arrest may be served, are sought to be extended for a further period of 12 months, is dismissed with costs.

2. In respect of the remaining vessels the period of validity of the summons in rem issued under case numbers AC40/2016 and AC41/2016 and the period in which writs of summons *in rem* and warrant of arrest may be served, is extended for a further period of 12 months being from 2 September 2017 to 3 September 2018, 16h30 with no order as to costs.

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LE GRANGE, J