IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]
Exercising its Admiralty Jurisdiction **[REPORTABLE]**

Case no. AC5/19

Name of ship: **mv 'FALCON CONFIDENCE'**

In the matter between:

THE MOTOR VESSEL 'FALCON CONFIDENCE' First Applicant

FALCON CONFIDENCE SHIPPING LTD Second Applicant

and

NADELLA CORPORATION Respondent

JUDGMENT DELIVERED ON 13 DECEMBER 2019

SHER, J:

1. This is but another skirmish in a long battle which is being waged. The applicants, being the MV *Falcon Confidence* and Falcon Confidence Shipping Ltd (the company which owns it) have made application, as a matter of urgency, for an Order setting aside the vessel's arrest at the instance of the respondent corporation ('Nadella') on 17 January 2019, which was effected by means of an *ex parte* Order of this Court exercising its admiralty jurisdiction.

The factual background

2. The arrest was affected in order to obtain security for a claim in the amount of USD 3 947 483 which Nadella intended to advance in arbitration proceedings in Singapore against Falcon Carrier Shipping Ltd ('FCS'), arising from the alleged breach of a warranty provision in an agreement of sale in terms of which FCS sold a ship known as the MV *Falcon Carrier* to Nadella in 2013. The basis for the arrest of the MV *Falcon Confidence* was that it was an 'associated' ship in terms of the relevant provisions[1] of the Admiralty Jurisdiction Regulation Act[2] ('the AJRA'). In this regard it was contended that at the time the MV *Falcon Confidence* was beneficially owned or controlled by the selfsame person or juristic entity which owned the MV *Falcon Carrier*.

3. In order to obtain the vessel's release, on 23 January 2019 the second applicant provided Nadella with a letter of undertaking (LOU), commonly referred to as a 'club letter', from the United Kingdom Mutual Steamship Association (Europe), a so-called 'P&I Club' ie a Protection and Indemnity Club, in terms of which it undertook to make payment of any amount which might in due course be found to be owing in respect of Nadella's warranty claim, to a maximum of USD 5 266 692.66.[3] P&I Clubs are mutual associations formed by ship operators, which provide cover to their members against a range of maritime and shipping related claims.

4. Following the furnishing of the LOU the applicants in turn launched an application in terms of which they sought an Order setting aside the arrest and directing Nadella to put up security for costs (in respect of both the proceedings to set aside the arrest as well as in respect of an intended claim for damages for wrongful arrest).

5. On 25 April 2019 the Judge-President ordered that the application was to be heard on 5 June 2019, on which date after hearing argument I directed that the issue of whether or not the MV *Falcon Confidence* was an associated ship

[1] Ss 3(6) and (7).
[2] Act 105 of 1983.
[3] Being USD 3 947 493 in respect of capital, USD 869 198 in lieu of interest and a provision for costs up to an amount of USD 450 000.

should be referred for oral evidence and Nadella should provide security for the applicants' costs in the proceedings.

6. Consequently, on 19 June 2019 the parties presented me with a draft order they had agreed upon, which was duly made an Order of Court, in terms of which I directed that Nadella was to provide security for the applicants' costs in the proceedings [4] in an amount to be determined by the Registrar. As the Order did not expressly stipulate the form which the security should take, in terms of uniform rule 47 this was also for the Registrar to determine together with the amount thereof. In this regard the relevant sub-rule[5] provides that unless the court otherwise directs, or the parties otherwise agree, the form, amount and manner of security which is to be furnished to a party which is entitled thereto shall be determined by the Registrar.

7. About two months later, on 7 August 2019, two writs of execution were issued by an entity known as the Newbrook Shipping Corporation out of the KZN local division, Durban whereby the Sheriff for the district of Inanda, Durban was directed to attach and to take into execution Nadella's 'right, title and interest' in the security which was being held by it by way of the LOU which had been furnished by the applicants, as well as in the current proceedings pertaining to the arrest of the MV *Falcon Confidence.*

8. The underlying judgment debts in respect of which the wrists were issued were as follows: One of the writs was issued in respect of an Order which was made by the KZN High Court on 23 December 2015 whereby Nadella was directed to provide security in the amount of USD 827 849 for a claim for damages which Newbrook intended to lodge against it in respect of an earlier arrest which it had affected in Durban waters in September 2015 of a ship known as the MV *Falcon Traveller*, which was owned by Newbrook and which Nadella had alleged was also an associated ship, which arrest had subsequently been set aside by the KZN High Court.

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[44] These excluded costs relating to second applicant's application for counter-security in respect of its intended claim for the alleged wrongful arrest of the MV *Falcon Confidence,* which application I directed was to stand over for determination at the hearing of the issue which was referred for oral evidence.

[5] Rule 47(5).

9. The other writ was issued in respect of a taxed bill of costs (for the amount of R 882 311.45) which Newbrook had obtained in respect of the proceedings for the setting aside of the arrest of the MV *Falcon Traveller*.

10. The Sheriff purported to attach these rights by service of the writs of attachment at the offices of Nadella's attorneys and, at the direction of the applicants' attorneys, who were also acting for Newbrook, the Sheriff also made repeated attempts to attach and remove the court files in the proceedings in this matter, from my Chambers. However, with the intervention of the Registrar the physical removal of the files was prevented, although they were placed under attachment.

11. Thereafter, on 14 August 2019 the applicants' attorneys proceeded to advise Nadella's attorneys that as a result of the attachment of its rights in these proceedings control over them now vested in the hands of the Sheriff of Durban, and consequently neither they nor Nadella had any right or authority to continue to act in respect thereof. Pursuant thereto the applicants' attorneys served a notice on Nadella's attorneys in terms of uniform rule 7 whereby their authority to act was formally placed in issue. Subsequently the applicants also launched a further application out of this Court at the end of August 2019 in terms of which they sought to interdict Nadella from continuing with the *viva voce* proceedings which were scheduled to commence on 7 October 2019, on the basis of the attachments which had been effected and the rule 7 notice.

12. By agreement between the parties the interdict application, as well as a counter-application by Nadella for an Order declaring the rule 7 notice to be an irregular step and setting it aside, were similarly postponed for hearing on the day when the *viva voce* proceedings were due to commence.

13. In the meantime, Nadella launched an urgent application in the KZN High Court to set aside the writs, which succeeded before Olsen J on 16 September 2019. After the learned judge also dismissed an application for leave to appeal the following day, the applicants petitioned the Supreme Court of Appeal for leave to appeal the Orders which he granted.

14. As a result of all of this, the hearing of *viva voce* evidence which was scheduled to commence on 7 October 2019 inevitably had to be postponed *sine die* pending

the outcome of the appeal proceedings in relation to the application for the setting aside of the writs. Effectively therefore the continuation of the proceedings in the principal matter which is pending before me has been stymied.

15. In the judgments which he handed down Olsen J held that the issuing of the writs constituted an abuse of the process of the KZN High Court and sought to obstruct the conduct of the *viva voce* proceedings which were due to commence in this Court.

16. On 2 October 2019 the parties appeared before the Registrar who duly determined that security in an amount of R 1.1 mil should be provided by Nadella, at which time its attorneys proposed that it be effected by transfer of this amount into an account held in escrow by them, as against an undertaking to make payment of whatever was found to be due by the Court. In the event that the applicants were not amenable to the funds being held in trust by its attorneys Nadella offered to pay them over into their attorneys' trust account. Although the applicants' attorney indicated that he was amenable to such a proposal his clients were not. They said they feared that the undertaking might not be honoured in the event that Nadella fell out with its attorneys, and they accordingly insisted on security being provided in the form of a bank guarantee from one of 4 local banks. The Registrar duly acceded to this request and directed Nadella to file the requisite guarantee within 14 days ie by close of business on 22 October 2019.

17. As it turned out this did not happen, notwithstanding valiant efforts on the part of Nadella to comply with the Registrar's directive.

18. On 3 October Nadella's attorneys requested the applicants' attorneys to prepare a draft guarantee which would be acceptable to their clients, which could then be forwarded to the relevant bank. Over the course of the following week the parties exchanged a number of drafts until on 10 October the final version was agreed upon.

19. The following day Nadella's attorney forwarded it to the relevant department at First National Bank (a bank with which he had previously had dealings in relation to the provision of a similar guarantee), under cover of a letter in which he

indicated that what was sought was security in the form of a bank guarantee for R 1.1 mil, as against which Nadella would deposit funds in such an amount with the bank. Consequently, the bank was requested to advise as to what its funding, compliance and 'FICA' requirements were, as Nadella was a foreign company which was registered in Nevis.

20. Other than to acknowledge receipt and to state that it would revert in due course, the bank appears to have done very little, if anything, to expedite the process, notwithstanding repeated requests for feedback as to the status of the application and various reminders of the looming deadline.

21. Not even an offer by Nadella on 21 October to provide a counter-guarantee via banking facilities it enjoyed with Citibank in the United Arab Emirates, was sufficient to get FNB to issue the guarantee, and as at the deadline date of 22 October it advised that there still were (unspecified) 'internal processes' (sic) which needed to be completed.

22. On 22 October Nadella's attorneys informed the applicant's attorneys of the difficulties which they had been experiencing and that the process was being held up by the bank, but they were expecting the matter to be resolved shortly.

23. The applicants were however not prepared to give Nadella any more time and the very next day they launched the instant application, as a matter of urgency, whereby they sought an Order setting aside the arrest of the MV *Falcon Confidence* on the grounds of Nadella's failure to provide the security it was ordered to. Although the application was brought on an urgent and expedited basis no date for when it was to be heard was specified in the notice of motion, and it was simply indicated therein that this was to occur on a date which was to be set by the Court. Consequently, although it gave notice of its intention to oppose the application Nadella continued, in the meantime, to attempt to obtain the requisite guarantee.

24. On 24 October its attorneys again wrote to FNB. They pointed out that the draft guarantee which they had supplied had been lying with it for almost 2 weeks. They were then advised that the guarantee was still with the bank's legal

department and it was unlikely that it would be accepted in the form it had been provided, but the bank would revert shortly.

25. On 30 October 2019 Nadella's attorneys enquired what progress had been made and how the 'logjam' (sic) could be resolved. In response the bank official they had been dealing with simply copied them in to an internal email which she had addressed to officials in another department, in which she enquired from them whether they had a chance to 'look at the request'. Shortly thereafter an official from the other department requested Nadella's attorneys to provide the bank with details of the amount of the guarantee which was to be provided and the 'expiry date' thereof, as well as details of the bank account which Nadella's attorneys held with the bank (all of which information the bank already had in its possession), but which was in any event duly provided again the same day.

26. Given the difficulties it was experiencing with FNB, Nadella's attorneys had in the meantime also made attempts to ascertain whether they could procure the security required, from alternative sources, including other banks and The West of England Shipowners Mutual Insurance Association (Luxembourg), a P&I club of which Nadella is a member, and which is apparently one of 13 P&I Clubs who are members of the prestigious International Group of P&I Clubs, which collectively provide maritime liability cover for almost all of the world's oceangoing tonnage.

27. On 31 October 2019 Nadella's attorney sent the applicants' attorneys another detailed letter in which he again set out chapter and verse of the difficulties he had experienced in trying to obtain the requisite bank guarantee and indicated that as a result The West of England P & I Club had been approached and had agreed to assist by providing a standard form LOU in the amount set by the Registrar. Nadella's attorney also pointed out that LOUs from P&I clubs are commonly accepted in lieu of security, by courts and litigants alike in maritime matters the world over, and in this regard he reminded the applicants that they had obtained the release of the MV *Falcon Confidence* from arrest, by furnishing a similar LOU from a P&I club of like standing, to Nadella.

28. Consequently, Nadella requested the applicants to confirm that they would accept the LOU which had been offered by The West of England in substitution of a bank guarantee from a local bank, failing which they would proceed to file an answering affidavit in the application to set aside the arrest and lodge a counter-application for leave to serve and file the LOU as a substitute form of security.
29. In response the applicant's attorneys replied that the applicants were not prepared to accept the LOU which was tendered as they did not accept that Nadella was entitled to 'unilaterally alter' the form of security which had been determined by the Registrar, and they accordingly called upon Nadella to file its answering affidavit by the following day.
30. On 5 November 2019 The West of England duly furnished Nadella's attorneys with the original LOU, a copy of which was annexed to the answering affidavit which was filed.

The law

(i) <u>The parties' contentions</u>

31. The applicants contend that Nadella has no right or entitlement in law to amend the Order for security which was made, and no good cause exists for the Court to show it any leniency and to condone its non-compliance therewith. They submit that as the Order was final in form and effect and not interlocutory, it is not capable of being varied by the Court and can only be altered on appeal by an appellate Court. They contend further that, at best for Nadella, insofar as the Registrar's determination of the *quantum* and the form of the security concerned constituted administrative action it could possibly have been reviewed in terms of the Promotion of Administrative Justice Act [6] provided there were cogent grounds therefor,[7] which there were not.
32. In support of these contentions the applicants refer to the decision of this Court [8] in MV *Akkerman* [9] which held that as in the case of orders for security which are

[6] Act 3 of 2000.
[7] As was held in *Trakman No v Livshitz & Ano* 1995 (1) SA 282 (A) at 289G.
[8] Per Thring J.

made in ordinary civil disputes, an order for the furnishing of security for costs in an admiralty action is not interlocutory, but final in nature and effect, as it is definitive of the parties' rights in regard thereto, incapable of being altered by the Court which granted it and dispositive of the relief which was sought in relation to it. As such, whilst it is capable of being appealed, it is (ordinarily) not amenable to variation or to being set aside by the Court which granted it (save for rescission or variation at common law or in terms of uniform rules 31 or 42, *inter alia* on the grounds of fraud, *iustus error,* ambiguity or patent mistake).[10]

33. On other hand, Nadella contends that inasmuch as the Order which I made was not prescriptive in relation to the form which the security was to take or the manner in which it was to be provided and left this up to the Registrar to determine, together with the amount thereof, it was not final or definitive (either in form or effect) nor was it dispositive of the relief sought or the parties' rights, and consequently the Registrar's determination in this regard can be altered or amended by the Court in terms of s 5(2)(c) of the AJRA, which provides that in the exercise of its admiralty jurisdiction this Court has the power to direct that any Order which it makes in relation to the furnishing of security may be subject to such conditions as appear to it to be just.

(ii) <u>The applicable principles</u>

34. In order to provide some context for the discussion which follows and the decision I have arrived at it is necessary to set out some basic principles which, in my view, form the backdrop to matters such as these.

35. In the first place, whilst rule 47 of the uniform rules, which deals with the procedural aspects of applications for security for costs, is of general application in admiralty proceedings[11] this is subject to the *caveat* in s 4(1) of the AJRA that it is not to be 'inconsistent' (ie at odds) with proceedings in terms of the Act.

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[9] MV *Akkerman: Fullmoor Shipping SA v Magna Hellas Shipping SA* 2000 (4) SA 584 (C), following the decision of the Full Bench in *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council & Ano* 1999 (4) SA 799 (W) at 804C-E.

[10] Vide MV *Akkerman* n 9 at 588H-589B.

[11] By virtue of the fact that in terms of admiralty rule 24 it is not one of the uniform rules which is expressly excluded from application to admiralty proceedings.

36. In this regard, in *Devonia Shipping* [12] this Court held that it would be inappropriate to apply the practice pertaining to the furnishing of security in terms of the common law, holus-bolus to the practice and jurisdiction to order security for a claim and/or costs which is conferred upon an admiralty Court in terms of the AJRA, as they are 'distinct jurisdictions' which are governed by different considerations. Thus, for example[13] whereas at common law a Court may not have the general power to order a defendant to furnish security to a plaintiff, in respect of the plaintiff's claim or costs, this is expressly provided for in terms of the AJRA[14] and commonly allowed (as, it might be said, is the power which the Court has to order a plaintiff to furnish security for a defendant's costs).

37. In addition, whereas in ordinary civil matters the principles applicable to the furnishing of security are aimed at protecting the Court's *incolae* against *peregrini*, the principle consideration in relation to the furnishing of security in admiralty proceedings is the effectiveness of any Order or judgment which may ensue.[15] This is amply illustrated by the facts in this matter, where all the parties are *peregrini*, and the principal aim of any Order pertaining to the setting of conditions for the furnishing of security by Nadella must therefore surely be directed at ensuring, as far as possible, that it will be effective ie that it will be one which is capable of being enforced, for without this essential feature any Order which is subsequently obtained in relation to the underlying dispute for which it serves as security will not be worth the paper it is written on, and in my view when applying and giving effect to the provisions of uniform rule 47 in admiralty matters this is a cardinal consideration.

(iii) <u>The relevant provisions of uniform rule 47 and the AJRA</u>

38. As far as uniform rule 47 itself is concerned, it is also important to note that although it provides that in the absence of any contrary direction by the Court in this regard, security shall be given in the form, amount and manner directed by

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[12] *Devonia Shipping Ltd v* MV *Luis (Yeoman Shipping Co Ltd Intervening)* 1994 (2) SA 363 (C) at 371E-F.
[13] *Id,* at 371H.
[14] In terms of s 5(2)(b) an admiralty Court may order any person to give security for costs, or for any claim.
[15] MV *Rizcun Trader (3): Manley Appledore Shipping Ltd v* MV *Rizcun Trader* 1999 (3) SA 966 (CPD) at 976G; *The Catamaran TNT: Dean Catamarans CC v Slapinski (No.1)* 1997 (2) SA 383 (C).

the Registrar, it is only in relation to the *amount* of the security which is to be furnished[16] or any later application for an increase thereof [17] that the Registrar's decision is final. Clearly, by providing that in the absence of a determination by the Court as to the *quantum* of the security which is to be provided the Registrar has the power to do so, and that save for the power to increase the *quantum* previously set by him, the Registrar's decision in this regard will be final, the legislature intended to shift the burden of having to adjudicate this aspect in relation to the furnishing of security, onto an administrative functionary, who will be better suited to dealing with such an enquiry, which often involves wading through and weighing up competing draft estimate bills of cost (and in the case of security for an arrest-related maritime claim the possible capital value of a ship). One can understand that the legislature may have wanted to avoid or spare judges from having to deal with such matters, and to limit the scope and ambit of any contestation on this aspect.

39. As the Registrar functions, in essence, as an agent of the Court when making determinations pertaining to the furnishing of security in terms of the rule, it thus appears from the wording thereof that the Court retains a residual power, not only insofar as any reduction in the security which is set by the Registrar is concerned, but also in regard to any alteration in the form and manner in which the Registrar has directed that it is to be provided, as the rule is silent in this regard. In my view, without such a residual power the Registrar's determination on these aspects would be immutable, and incapable of being altered where fairness or the dictates of justice required it. Thus, where force of circumstance effectively makes it impossible to comply with the Registrar's directive, or would result in undue harm or prejudice, or where it would be against the interests of justice for security to be given in the form or manner as directed by the Registrar, unless the party which is required to provide the security is able to approach the Court for the necessary relief in this regard it would be stuck in an impossible situation: it would be unable to obtain recourse from the Registrar who would be

[16] Rule 47(2).
[17] Rule 47(6).

unable to change his determinations as he would be *functus officio,* and it would be unable to approach the Court on appeal or review, as neither of these remedies would be appropriate or available to it. The exercise of this power is an incidence of the inherent power which this Court, as a High Court, has in terms of s 173 of the Constitution, to regulate its own process and to develop the common law, having regard for the interests of justice.[18]

40. In contrast to the ambit of the Court's ordinary civil powers in relation to applications for security in terms of uniform rule 47, in maritime claims admiralty Courts expressly have the power, in terms of the AJRA,[19] to order that any security which was given not only be increased, but also that it be reduced or discharged, subject to such conditions as appear to it to be just. In addition, the Court has the power[20] to impose such conditions as may appear to it to be just, in relation to any Order which it has made in relation to the furnishing of security. Thus, the powers which an admiralty Court has in relation to Orders for security in terms of the AJRA are wider and more extensive than the power which a Court may exercise in terms of rule 47.

41. In MV *Akkerman* [21] the relevant Order directed that security in a specified amount was to be furnished in a form which was acceptable to the applicants, or failing agreement between the parties in this regard, in a form which was acceptable to the Registrar. Clearly, inasmuch as the terms of such an Order comprehensively covered and pronounced upon the requisite elements of the security which was required (ie the amount, form and manner of the provision thereof) they were clearly final in effect and definitive of the rights of the parties,[22] and as such, once the Order was fulfilled by means of an agreement in relation to the form the security was to take (or had the parties been unable to agree on this, once the Registrar made a determination in this regard) it was no longer susceptible to variation or supplementation by the Court.

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[18] See *Boost Sports v SA Breweries* 2015 (5) SA 38 (SCA) at para [13].
[19] S 5(2)(d).
[20] S 5(2)(c).
[21] Note 9 at 587E-G.
[22] *Id,* at 590B.

42. The Order in MV *Akkerman* is clearly distinguishable from the one which was made in this matter on 19 June. The Order I made was silent as to the form and the manner in which the security which was required was to be provided, and neither pronounced upon, nor did it prescribe how, those aspects were to be determined. As such, in my view it cannot be said to have been either final or definitive in relation to those aspects, either in form or effect, nor was it dispositive or decisive, either of the relief sought or the parties' rights. In the circumstances I cannot see why the Registrar's subsequent determination, in terms of uniform rule 47, that the security which was required was to be furnished in the form of a bank guarantee on or before 22 October 2019, should stand as an immutable and unalterable determination, when despite concerted efforts Nadella was unable to comply with it and the time period concerned has come and gone, and the Registrar is *functus officio* and therefore cannot be asked to alter his directive.

43. In the same way as the Court would, in my view, have the power in terms of s 5(2)(c) of the AJRA to grant an extension of time to a party who has been unable to comply with a time period which was set by the Registrar for the furnishing of security [23] in order to avoid an injustice, so too it must surely have the power, either in terms of the self-same provision of the AJRA (or in the exercise of its residual power in terms of uniform rule 47 and its inherent power in terms of s 173 of the Constitution), to Order that a directive by the Registrar in relation to the form of, or manner in which security must be provided, which has not been capable of being implemented through no fault of the party concerned and which has effectively lapsed, can be altered or substituted with an alternative.

44. By making such an Order the Court would not be seeking to set aside or reverse the original Order it made on 19 June 2019, that Nadella should provide security for the applicants' costs. All that the Court would be doing is to reinforce and supplement the Order by adding a condition to it viz that the security which

[23] It also has the power, in terms of admiralty rule 19(1), to extend or abridge any time period or to advance or postpone any date which is laid down in the rules, or in any Order of Court.

Nadella is to provide, should be by way of the LOU which was tendered by The West of England. In my view, there is nothing in uniform rule 47 or the AJRA which stands in the way of the Court making such an Order, and it is one which is called for in the interests of justice, with a view to ensuring that the applicants are provided with an effective (and thus enforceable) form of security.

45. In my view exactly the same endpoint is arrived at if one approaches the matter on the basis that as the directive by the Registrar has lapsed due to the effluxion of time and/or it is no longer capable of being complied with or of being enforced (both in relation to time and form), the Court is empowered, by virtue of the provisions of the AJRA I have referred to,[24] to make a further, fresh Order directing Nadella to furnish security to the applicants, in the form of the LOU from The West of England.

Conclusion

46. In the result the application by the applicants to set aside the arrest of the MV *Falcon Confidence* must fail and the counter-application by Nadella must be upheld. In my view the application was ill-conceived, and the applicants' arguments in respect of both the application and the counter-application are contrived.

47. It has long been accepted in our maritime law that the furnishing of a 'club letter' of undertaking ie an LOU from a P&I Club constitutes good and sufficient security for the purpose of admiralty claims pertaining to the arrest of a vessel, or as security for costs in other maritime claims in terms of the AJRA.[25]

48. As was previously pointed out The West of England is one of the largest P&I clubs in the UK and is part of the International Group of 13 P&I clubs which collectively provide insurance cover to around 90% of the world's ocean trading tonnage. It has been in existence for about 150 years and currently provides third-party liability coverage to over 3700 ships, worldwide. It is rated A+ by

[24] Notably s 5(2)(c) thereof.

[25] MV *Alam Tenggiri: Golden Seabird Maritime Inc & Ano v Alam Tenggiri SDN BHD & Ano* 2001 (4) SCA 1329; *The Merak S: Sea Melody Enterprises SA v Bulktrans (Europe) Corporation* 2002 (4) SA 273 (SCA); *The Bow Neptun Star Tankers AS v Methyl Company Ltd* 2005 SCOSA B313 (D).

Standard and Poor and has strong levels of capitalization, with free reserves in the order of approximately USD 306 mil.

49. In the circumstances there is no question that it is good for its LOU, which is for the relatively trivial amount of a maximum of R 1.1 mil ie approximately USD 75 000 in today's terms, given the current exchange rate. As is standard in most 'club letters', included in the LOU is a consent by The West of England to submit to the jurisdiction of this Court in relation to any proceedings to enforce it. As such, the LOU is enforceable in this jurisdiction and it would only be in the extremely unlikely event that The West of England were to refuse to honour it that the applicants would be compelled to execute any judgment they obtained in the United Kingdom. As was submitted by Nadella's counsel it is inconceivable that The West of England would not comply with an Order of this Court, having submitted to its jurisdiction, given its reputation and the terms of the undertaking it has given, which the applicants concede is in line with the standard terms commonly adopted in such undertakings. In the circumstances the applicants' refusal to accept the LOU was unreasonable and unacceptable, given that they had no difficulty in providing one to Nadella from a similar P&I Club which is a member of the International Group.

50. In my view, the applicants' refusal to accept the LOU from The West of England indicates that the real object of these proceedings was to attempt to frustrate Nadella from having its day in Court in the *viva voce* proceedings pertaining to the issue of whether or not the MV *Falcon Confidence* is an associated ship. This must inevitably weigh heavily on the issue of costs, in respect of which Nadella seeks a punitive order.

51. In my view, the applicants' conduct, both in launching the application to set aside the arrest, as a matter of urgency, and then persisting with it after they were apprised of the offer of an LOU from The West and Nadella's answering papers, constituted an abuse of process. Although they were legally within their rights to bring the application, given that Nadella had failed to provide the security it was required to, the usual course which is followed by applicants in such matters is to

first ask for an Order staying the proceedings,[26] on pain of submission of the requisite security within a further period of time, failing which the applicant will thereafter be entitled to make application for the setting aside thereof.[27] The fact that the applicants did not do so indicates that they were not really interested in obtaining security for their intended claim. What they were interested in was having Nadella non-suited.

52. Thus, immediately on expiry of the relevant period which Nadella had to obtain a guarantee the applicants proceeded to issue an urgent application in which they sought an Order setting aside the arrest. At the time when they did so there was no question of any urgency. The proceedings which were scheduled to commence in October were not going to take place after the writs had been issued in August and the attachments had been effected, an interdict had been sought and the notice in terms of uniform rule 7 had been issued. When the writs were set aside in the middle of September, the applicants immediately petitioned the SCA for leave to appeal, and they must have known that this too would have the effect of ensuring that the proceedings would be delayed for a considerable period of time. In the circumstances there was no cause or reason to subject Nadella or the Court to the stresses and strains of having to deal with an application to set aside the arrest, as a matter of urgency. In my view this conduct in itself merits a punitive costs order.

53. In the circumstances I make the following Order:

    53.1 The application to set aside the arrest of the MV *Falcon Confidence* is dismissed with costs (including the costs of two counsel where so employed), on the scale as between attorney and client.

    53.2 The counter-application succeeds with costs (including the costs of two counsel where so employed), on the scale as between attorney and client.

    53.3 Para [3] of the Order which was made by this Court on 19 June 2019, in relation to the furnishing by the respondent (Nadella) of security for the

[26] In terms of uniform rule 47(3).
[27] As per uniform rule 47(4).

applicants' costs of the proceedings under case number AC 5/2019, is supplemented and amended, to read as follows:

"[3]*The applicant is ordered to provide security for the respondents' costs of the proceedings under case number AC 5/2019 (save for the costs related to the second respondent's application for counter-security for its claim for the alleged wrongful arrest of the first respondent) from inception to the final determination of the application by this Court, in the amount fixed by the Registrar on 2 October 2019, in the form of the Letter of Undertaking issued by The West of England Shipowners Mutual Insurance Association (Luxembourg) on 6 November 2019, a copy of which is annexed hereto marked annexure 'A*'."

M SHER

Judge of the High Court

Appearances:

Applicants' counsel: M Steenkamp

Applicants' attorneys: Norton Rose Fulbright (Durban & Cape Town)

Respondent's counsel: M Wragge SC and J Mackenzie

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