IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN
(Exercising its admiralty jurisdiction)

Case No. AC13/2018

Before: The Hon. Mr Justice Binns-Ward
Date of (online) hearing: 15 August 2022
Date of judgment: 15 August 2022

Name of ship: MV *Madiba 1*

In the matter between:

ANDRE VAN NIEKERK Plaintiff/Respondent

and

THE MV "MADIBA 1" Defendant/Applicant

JUDGMENT
(Application for leave to appeal)

BINNS-WARD J:

[1] The owner of the MV *Madiba 1* has applied for leave to appeal against this court's judgment dismissing its application to amend its plea in the action *in rem* instituted by a creditor of Meltt (Pty) Ltd (in liquidation) ('Meltt').[1] It is alleged in the particulars of claim that Meltt was the charterer by demise of the vessel when it incurred the debt that gave rise to the maritime claim.

[2] The arrest of the vessel for the purpose of the action *in rem* was effected in terms of s 3(4)(b) of the Admiralty Jurisdiction Regulation Act 105 of 1983 ('the AJRA'), which is quoted in para 2 of the principal judgment. Section 3(4)(b) contemplates the arrest of a vessel for the

[1] *Van Niekerk v The MV "Madiba 1"* [2022] ZAWCHC 125 (17 June 2022).

purpose of instituting an action *in rem* in circumstances in which the owner of the property to be arrested would be liable to the claimant in an action *in personam* in respect of the maritime claim concerned.

[3] The plaintiff's maritime claim does not lie against the owner of the vessel, it lies against Meltt, allegedly the demise charterer of the vessel. The plaintiff was nonetheless able to rely on the provisions of s 3(4)(b) of the AJRA to institute proceedings against the vessel by virtue of the deeming provision in s 1(3) of the Act, which provides:

> 'For the purposes of an action *in rem*, a charterer by demise shall be deemed to be, or to have been, the owner of the ship for the period of the charter by demise.'

[4] As recorded in the principal judgment,[2] it was common ground that the evident object of s 1(3) of the AJRA was to give effect domestically to art. 3(4) of the International Convention Relating to the Arrest of Sea-going Ships (Arrest Convention), 1952.[3] The principal judgment relates that equivalent legislation is to be found in other maritime jurisdictions internationally.[4]

[5] The policy considerations informing the adoption of such legislation and the practical effect of the pertinent provisions were discussed in *The "Chem Orchid"* [2015] SGHC 50; [2015] 2 Lloyds Rep. 666, and rehearsed at some length in this court's principal judgment.[5] As pointed out in the principal judgment, the interpretation of s 1(3) adopted by this court is consistent with the construction of the provision in all the previous South African reported cases in which the import of the deeming provision has been considered. The South African jurisprudence has construed s 1(3) of the AJRA to consistent effect with the equivalent, albeit differently worded,

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[2] In para 16.

[3] The relevant text of the 1952 Arrest Convention is quoted in para 16 of the principal judgment, in note 5.

[4] In para 11, in note 3, where the equivalent provisions in the United Kingdom, Singapore and Australia are described.

[5] In para 22-23, in particular.

statutory provisions found in other maritime jurisdictions. It is an interpretation that has allayed the concerns expressed by various academic commentators shortly after the insertion of s 1(3) into the AJRA in 2000 about the possible far-reaching consequences of construing the provision to make the demise charterer the actual owner's proprietary substitute; something that they all agree cannot have been intended by the lawgiver.[6]

[6] The interpretative approach adopted by this court (and in the other South African judgments in which s 1(3) has been considered) is consistent with that stated as follows by Brandon J (as Lord Brandon then was) in *The Andrea Ursula* [1973] QB 265[7] at 270-1 (a case with interesting parallels concerning the construction of domestic legislation to give effect to art. 3(4) of the Arrest Convention): '*Recent decisions of the Court of Appeal show that, where the meaning of an English statute intended to give effect to an international convention to which the UK is signatory is not clear, the court can and should look at the terms of the convention to assist it in construing the statute; and further that, having done so, the court should so construe the statute as to give effect, so far as possible, to the presumption that Parliament intended to fulfil, rather than break, its international obligations.* Salomon v Customs and Excise Commissioners *[1967] 2 QB 116;* Post Office v Estuary Radio Ltd *[1968] 2 QB 740. ... I turn accordingly, to consider the relevant provisions of the International Convention relating to the Arrest of Sea-going Vessels* (sic)*, and the provisions of the Act of 1956 intended, or apparently intended, to give effect to them.*' (South Africa, like Singapore and Australia, was not a signatory to the Arrest Convention but, as already noted, it is common ground that art. 3(4) of the Convention was the begetter of s 1(3) of the AJRA. The evident legislative object was to bring this country's admiralty jurisdiction rules into line with those widely applicable internationally.)

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[6] See para 11 and 13 of the principal judgment.

[7] *Medway Drydock & Engineering Co. Ltd. v M.V. Andrea Ursula*.

[7] As explained in the passage from *The "Chem Orchid"* [2015] SGHC 50; [2015] 2 Lloyds Rep. 666 quoted in the principal judgement,[8] the object of art 3(4) of the Arrest Convention was to put the actual owner of a vessel at risk in respect of the maritime claims of creditors of the demise charterers of the vessel. It is to give such creditors a right to proceed *in rem* against the vessel as if it were the property of the charterer; a remedy the creditors did not enjoy before the introduction of provisions such as s 1(3) of the AJRA and its international equivalents. This consideration informed this court's finding that s 1(3) of the AJRA accordingly has nothing to do with transferring any of the proprietary incidents of ownership from the actual owner to charterer. It is about attaching risk, not transferring rights. As Mr *Wragge* SC for the vessel owner indeed conceded in his argument of the application for leave to appeal, s 1(3) is in essence a purely jurisdictional provision, widening the previously more circumscribed circumstances in which a vessel can be liable to arrest for the purpose of instituting proceedings *in rem*; cf. *Taxidiotiki-Touristiki-Nautiliaki Limited (t/a Aspida Travel) v The Owners and/or Demise Charterers of the Vessel 'Columbus'* [2021] EWHC 310 (Admlty) (18 February 2021) para 2 (in relation to the equivalent UK statutory provision).

[8] Both of the special pleas that the defendant sought to introduce by way of the intended amendments to its plea[9] relied on a construction of s 1(3) that would equate Meltt with the owner of the vessel for the purpose of insolvency law. It is a construction that for all practical purposes would result in the characterisation of the vessel, for insolvency and company winding up purposes (hence the vessel-owner's invocation of s 359(1)(b) of the 1973 Companies Act), as if it were the property of the company in liquidation, rather than that of the actual owner. That is obviously a

[8] In para 22.

[9] The intended amendments are set out in para 4 of the principal judgment.

paradoxical position for any actual owner to adopt. But, as observed in the principal judgment,[10] it is a position taken not with any concern for the *concursus creditorum* in Meltt's liquidation, or the orderly winding up of that company (which Mr *Wragge* stressed was the object of 359(1) of the 1973 Companies Act), but only to seek to exempt its own property (the *res*) from the risk created by s 1(3) of the AJRA, and to thereby render the institution of the action *in rem* against *its* (ie the actual owner's) vessel incompetent. The owner's position predicates a construction of the provision that would defeat the sub-section's very object, viz to render the actual owner's property liable to attachment as security for the demise charterer's debt. (The vessel-owner sought support for its approach in the judgments in *Rennie N.O. v South African Sea Products (Pty) Ltd* 1986 (2) SA 138 (C) and *The Nantai Princess* 1997 (2) SA 580 (D), but, as explained in the principal judgment,[11] those matters, which pre-dated s 1(3) and did not involve maritime claims against the demise charterers of the vessels concerned, were fundamentally distinguishable. In both those cases the relevant companies were the actual owners of the *res*[12] and were in the process of liquidation at the time of the institution of the proceedings *in rem*.)

[9] The determinant criterion in this application for leave to appeal is whether the owner of the vessel has persuaded me to form the opinion that (i) the contemplated appeal would have a reasonable prospect of success; or (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.[13]

[10] In *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31 (31 March 2021), to which Mr *Wragge* referred in argument, the appeal court held '*The test of*

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[10] In para 8.

[11] In para 7.

[12] The arrested property in *The Nantai Princess* was not a vessel, but certain cargo on board a vessel.

[13] Section 17(1)(a) of the Superior Courts Act 10 of 2013.

reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.'[14] I am unable in this matter to find a sound rational basis for concluding that there is a reasonable prospect that another court would, on appeal, adopt the construction of s 1(3) of the AJRA or s 359(1)(b) of the 1973 Companies Act that would be necessary to give the vessel-owner's proposed amendments traction as unexcipiable.

[11] I am also not persuaded that there is any other compelling reason to grant leave to appeal. There are no conflicting judgments in point. On the contrary, the weight of authority lies against giving s 1(3) the import contended for by the vessel-owner.

[12] Mr *Wragge* submitted, however, that a good reason to grant leave to appeal was that the legal questions presented by the vessel owner's intended amendments were *res nova*. He is correct that there is no precedent in a case on all fours with this one. But the fact that an obviously bad point has not previously been raised and rejected does not afford a compelling reason for the court of first instance to grant leave to appeal when such a point is first raised and predictably rejected. In *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* [2020] ZASCA 17 (25 March 2020); 2020 (5) SA 35 (SCA), which also concerned an application for leave to appeal, Cachalia JA observed '*A compelling reason includes an important question of law or a discreet issue of public importance that will have an effect on future disputes. But here too, the merits remain vitally*

[14] In para 10.

important and are often decisive. [The applicant] *must satisfy this court that it has met this threshold*'[15]. In my judgment, the vessel owner has failed to meet the required threshold.

[13] The application for leave to appeal is consequently refused with costs.

A.G. BINNS-WARD
Judge of the High Court

Appearances:

Applicant's counsel:	M. Wragge SC J.D. Mackenzie
Applicant's attorneys:	Webber Wentzel Cape Town
Plaintiff / Respondent's counsel:	P.A. Van Eeden SC
Plaintiff / Respondent's attorneys:	Bowman Gilfillan Inc. Cape Town

[15] In para 2, footnote omitted.